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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE MID-SOUTH GRIZZLIES
(A Joint Venture); et al.,
*Petitioners**

v.

THE NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association; et al.,
*Respondents**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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* Petitioners are:

The Mid-South Grizzlies (A Joint Venture); John Edward Bosacco; Mid-South Grizzlies (A Limited Partnership); and Consolidated Industries, Inc.

Respondents are:

The National Football League, An Unincorporated Association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc.; and Pete Rozelle.

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The MID-SOUTH GRIZZLIES (a Joint Venture); John Edward Bosacco; Mid-South Grizzlies (a Limited Partnership); and Consolidated Industries, Inc., Appellants

v.

The NATIONAL FOOTBALL LEAGUE, an unincorporated association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc. and Pete Rozelle.

No. 82-1793.

United States Court of Appeals,

Third Circuit.

Argued Sept. 13, 1983.

Decided Nov. 4, 1983.

Rehearing Denied Dec. 5, 1983.

Member of now defunct professional football league sued existing league, its members and commissioner complaining that refusal to grant application for membership in defendant league violated the antitrust laws. The United States District Court for the Eastern District of Pennsylvania, Joseph L. McGlynn, Jr., J., 550 F.Supp. 558, rendered summary judgment for defendants, and applicant appealed. The Court of Appeals, Gibbons, Cir-

cuit Judge, held that: (1) summary judgment motion was ripe for decision without additional discovery; (2) statute which insulated from antitrust liability merger of two competing professional football leagues, resulting in creation of defendant league, was not directed at preserving competition in the market for professional football and did not oblige existing league to permit entry by a particular applicant to its monopoly power; and (3) as regards Sherman Act claim, applicant failed to show any actual or potential injury to competition or that its admission would be contracompetitive.

Affirmed.

1. Federal Civil Procedure [KEY] **2553**

Where affidavits are filed setting forth specific reasons why movant's affidavits in support of summary judgment cannot be responded to and the facts are in possession of the movant, a continuance of the motion for discovery purposes should be granted almost as a matter of course. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

2. Federal Civil Procedure [KEY] **1269**

Additional discovery on issue whether member teams of defendant professional football league were competitors was not warranted in antitrust action by rejected applicant for admission to league membership where not only did applicant fail to file required affidavit but its response to league's reply brief raised no more than a merely colorable claim that actual or potential competition for revenue other than from ticket sales and sales of television rights could be shown between a professional team based in applicant's hometown and other league members and adequate discovery had been had on agreed issue whether application was rejected on basis of objective criteria. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.; Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

3. Monopolies [KEY] **12.(1.10)**

Under rule of reason analysis, a Sherman Act restraint of trade claim can be established by proof that defendants contracted, combined or conspired among themselves, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that objects of and conduct pursuant to the contract or conspiracy were illegal and that plaintiff was injured as a proximate result of that conspiracy. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act §4, 15 U.S.C.A. §15.

4. Monopolies [KEY] **28(7.3)**

For purpose of rule-of-reason analysis in Sherman Act challenge to professional football league's rejection of application for league membership by former member of now defunct competing football league it was irrelevant that when one member of present league, which was result of statute insulating merger of leagues from antitrust liablity, was seeking legislation concerning television revenue-sharing practices it admitted a new team in home state of chairman of committee considering the bill and that when the leagues were seeking statutory exemption permitting their merger a team was added in home state of powerful senator and congressman who supported the legislation and that postmerger addition of two other teams was prompted by desire to limit term of proposed legislation prohibiting home teams from blacking out televised games. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

5. Monopolies [KEY] **12(6)**

Provision of 1966 legislation immunizing from antitrust liability merger of two or more football leagues into an expanded single league that "such agreement increases rather than decreases the number of professional football clubs so operating," could not reasonably be construed as addressing competition, and reference to increase in number of teams "so operating" was to

professional teams operating under antitrust exemption for television revenue sharing provided in 1961 statute and what 1966 statute suggested was that more home team territories would be added rather than to increase competition and statute permitted geographic enlargement of the resulting league's market power. 15 U.S.C.A. §§1291, 1294.

See publication Words and Phrases for other judicial constructions and definitions.

6. Monopolies [KEY] **12(6)**

The 1966 legislation permitting combination of members of two or more competing professional football leagues into one league did not obligate league which resulted from merger of two competing leagues to permit entry by any particular applicant to its shared market power and statute did not require the league to admit to membership an applicant from an area not presently served by existing league member. 15 U.S.C.A. §1294.

7. Monopolies [KEY] **28(1.4)**

Where member of defunct professional football team showed no actual or potential injury to competition from rejection of its application for franchise in existing professional football league which, by statute, had been granted monopoly power, the applicant could not succeed on Sherman Act claim of conspiracy to restrain trade, especially as applicant was not seeking recovery as a potential competitor outside the league but identified as the antitrust violation the league's negative vote on its application and statutory arrangement under which league functioned eliminated competition among its members and there was no showing that football teams located in applicant's territory and that of the nearest existing league member would complete for the same ticket purchases, etc. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

8. Monopolies [KEY] **28(6)**

Regardless of whether members of existing professional football league, which had been granted statutory monopoly, competed in a so-called "raw material market" for players and coaching personnel, rejection of application for admission to league, an act charged as violating antitrust laws, did not restrain applicant from competing for players by forming competitive league and applicant failed to show how, if its exclusion reduced competition for team personnel, that reduction caused an injury to its business or property. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

9. Monopolies [KEY] **12(1.6)**

The "essential facilities doctrine," as applied to Sherman Act challenge to rejection of application for admission to membership in professional football league having a statutory monopoly would result in additional competition in an economic rather than athletic sense and no recovery could be had on such theory where applicant failed to show how competition in any arguably relevant market would be improved if it were given a share of existing league's monopoly power. 15 U.S.C.A. §§1291, 1294; Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

10. Monopolies [KEY] **12(b)**

Rejection of application by member of now defunct professional football league for admission to membership in existing league did not violate Sherman Act's prohibition on attempts to monopolize as not only did Congress authorize existing league's acquisition of its present market power by way of merger but rejected applicant failed to show that its admission would be contracompetive in any way and area in which it would operate had been left by existing league for potential competitors. 15 U.S.C.A. §§1291, 1294; Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

Richard A. Sprague, Edward H. Rubenstone, Steve Alexander, Sprague & Rubenstone, Philadelphia, Pa., Gary Green (argued), Neil A. Morris, Sidkoff, Pincus, Greenberg & Green, Philadelphia, Pa., for appellants; Louis B. Schwartz, Philadelphia, Pa., of counsel.

Morris L. Weisberg, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., James C. McKay, Paul J. Tagliabue (argued), Covington & Burling, Washington, D.C., for appellees.

Before SEITZ, Chief Judge, and GIBBONS and ROSENN, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

Mid-South Grizzlies, a joint venture, and its members (the Grizzlies) appeal from a summary judgment in favor of the defendants in their suit against the National Football League (NFL), the league members, and League Commissioner Pete Rozelle, seeking damages under Section 4 of the Clayton Act, 15 U.S.C. §15 (1973). The suit concerns the defendants' refusal to grant the plaintiffs a football franchise. On appeal the Grizzlies contend that the district court erred: (1) in granting summary judgment while the Grizzlies' discovery requests were outstanding; and (2) in granting summary judgment when there were disputed issues of material fact.[1] We affirm.

I.

Background

The NFL is a not-for-profit business league, qualified for exemption from federal income tax under section 501(c)6 of the Internal Revenue Code, 26 U.S.C. §501(c)(6)(1967). The league has 28 members, each of

1. The court's decision is reported. *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D.Pa. 1982).

which is an entity organized for profit, engaged in the business of fielding a professional football team. The NFL was formed by the merger of two predecessor football leagues. That merger took place following the enactment, in 1966, of Pub.L. 89-800, §6(b)(1), 80 Stat. 1515, which amended Pub.L. 87-331, §1, 75 Stat. 732 (1961), 15 U.S.C. §1291. Section 1291, enacted in 1961, granted to certain professional sports leagues a limited exemption from the antitrust laws with respect to the joint sale of television broadcast rights for league games, and the 1966 amendment permitted "a joint agreement by which the members of two or more football leagues combine their operations in expanded single leagues . . . if such agreement increases rather than decreases the number of professional football clubs so operating." The 1961 exemption with respect to joint sale of television broadcasting rights, intended to overrule the judgment in *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa.1953), does not "otherwise affect the applicability or nonapplicability of the antitrust laws" to any other activities of persons engaged in professional team sports. 15 U.S.C. §1294. The 1966 exemption does no more than permit the combination of members of two or more leagues into one.

Under the 1974 constitution and by-laws of the NFL each member obliges itself to operate a professional football club which is a member of the league. Each member has a designated "home territory" within which it has "the exclusive right . . . to exhibit professional football games played by teams of the League," and "[n]o club in the League shall be permitted to play games within the home territory of any other club unless a home club is a participant." Home territory is defined as a designated city and "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city."[2] Constitution and By-

2. There are special provisions for the New York and San Francisco Metropolitan areas and for Green Bay, Wisconsin.

Laws, Article IV, Appendix at 1129a, 1138a. The addition of a new league member within the home territory of any member requires unanimous consent of the league members. *Id.* Article 3.1(b). Elsewhere, applicants for membership may be admitted by the affirmative vote of not less than three-fourths or 20 members, whichever is greater. *Id.* Article 3.3(c). No league member may have a financial interest, direct or indirect, in any other league member. *Id.*, Article 9.1(B)(1).

The combined league began functioning in 1970 with 26 members. Thereafter new home territories were designated for Tampa, Florida, and Seattle, Washington, and member teams with franchises for those home territories began participating in league play in 1976. The uncontradicted affidavit of Commissioner Rozelle establishes that the initiative for establishing those franchises came from the NFL, which negotiated for a stadium location, determined methods of providing the franchise with players, and only then evaluated and selected owners. *See, e.g.*, Rozelle Deposition, Appendix at 1290a, 1431a-1440a.

As authorized by 15 U.S.C. §1291, the NFL has made a joint sale to three major television networks of the regular season and post-season television rights. Television revenues are divided equally among all members. Receipts from the sale of tickets are shared between the home team, 60% and the visiting team, 40%. Each home team retains other revenues, derived from its local operations.[3] On average, however, more than 70% of each team's revenue is derived from sources other than its operations at the home location. *See* Defendants' Motion for Summary Judgment, Affidavit of Pete Rozelle, Appendix at 188a.

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3. These include revenue from non-network coverage of preseason games, and revenue from food and beverage concessions, parking, and sale of team paraphernalia. Such revenue varies both with attendance and depending on the terms of stadium leases.

In 1974 and 1975 the Grizzlies participated in the World Football League from a home team location in Memphis, Tennessee. The members of that league could be found to have been competitors of the members of the NFL in the national market for network television revenue. The World Football League disbanded, however, halfway through the 1975 football season. The NFL had no franchise at Memphis, and a home team designation for that location would not infringe upon the home territory of any NFL member. Upon the demise of the World Football League the Grizzlies applied to the NFL for admission to the league with a designated home territory at Memphis.

At meetings with the NFL Expansion Committee, and with the full NFL membership, the Grizzlies urged that it had in place at Memphis an established, functioning professional football enterprise. The application was rejected. This lawsuit followed.

II.

The Complaint

The Grizzlies' complaint, filed on December 3, 1979, does not charge that the provisions of the NFL's Constitution and By-Laws reserving to its members franchise exclusivity for designated home territories violates the antitrust laws. Indeed, the Grizzlies sought such an exclusive franchise for themselves. Thus this case does not present any issue of possible antitrust violation from the exclusion of potential competitors in the designated exclusive home territories.

Nor do the Grizzlies complain that the NFL's 60-40 home team-visitor revenue sharing arrangement, which is not exempted from antitrust scrutiny by 15 U.S.C. §1291, caused any injury to their business or property. Indeed, the Grizzlies sought to participate in that arrangement. Moreover, the Grizzlies make no complaint about the operation of the NFL arrangements for joint

sale of television rights. They do not charge, for example, that the demise of the World Football League was caused by the NFL's television marketing practices. Nor do they charge that if they had been admitted those practices should have been changed. Rather, as with the 60-40 split of ticket sale revenue, they sought to participate.

Determining what the Grizzlies do not charge as antitrust violations is somewhat easier than determining what is charged. The complaint alleges that Memphis is a highly desirable submarket for major league professional football, that the refusal to consider it as a home territory for a franchise was made pursuant to an agreement or understanding or conspiracy among NFL members, the NFL and the Commissioner, that no valid basis for rejection of the Grizzlies was articulated for formulated by the defendants, and that the rejection amounted to an unreasonable restraint of trade, or a group boycott. One motive for that conspiracy is alleged to have been a desire to punish, intimidate and restrain plaintiffs from participation in major league professional football because they had entered into competition with NFL members by participating in the World Football League. The exclusion, so motivated, and having the effects alleged, is said to be a violation of Section 1 of the Sherman Act, and an attempt to monopolize interstate trade and commerce in professional football in violation of Section 2 of that Act.

III.

The Summary Judgment Record

The defendants moved for summary judgment on March 2, 1981, supporting their motion with affidavits by Commissioner Peter Rozelle and by Daniel M. Rooney, Chairman of the NFL Expansion Committee, to which defendants attached 12 supporting exhibits. At the time of the motion there was outstanding a motion by the Grizzlies to compel answers to certain

interrogatories, and to compel production of documents. In opposition to the summary judgment motion the Grizzlies filed an extensive brief addressing the merits, and the affidavits of William R. Tatham, I.B. Rowe and Steve Alexander, Esq. The Grizzlies contended that the summary judgment motion should not be considered until the completion of discovery.

On August 13, 1981 the trial court filed a memorandum and order declining to consider the motion for summary judgment until the completion of the Grizzlies' discovery, but restricted the scope of discovery to "matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee, and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and the American Football League." 4 App. at 894. The Grizzlies were permitted to depose Mr. Rozelle, Mr. Rooney, and the other members of the NFL Expansion Committee; but solely with respect to the designated subject matter. The order fixed a schedule for renewal of the motion for summary judgment, for filing opposition to it, and for briefing. *Id.* at 895.

On September 16, 1981 counsel for the Grizzlies wrote to the trial judge asking for clarification of the discovery order. The court was asked if the order was intended

> to focus the parties' attention . . . solely upon the issue of whether fair, objective, and articulated standards were applied by the defendants in passing upon plaintiffs' application for membership in the NFL, whether such standards existed at the time, and whether any substantive consideration, . . . was ever given to plaintiffs' application by the defendants.
>
> If, in fact, it was the Court's intention to focus only on the objective criteria question at this time, and to accept the remaining criteria in the plaintiffs'

> Complaint as true for the purpose of this motion proceeding, the scope of discovery can be substantially limited without waiving our position, many of the pending discovery requests can be withdrawn, subject to renewal . . . , and more specific discovery . . . can surely proceed. . . .

Letter of Edward H. Rubenstone, Esq. to Hon. Joseph L. McGlynn, Sept. 16, 1981, 4 App. at 1083-1084. The court replied two days later that "[y]our assumptions concerning the rationale underlying my order dated August 13, 1981 are correct." The court noted the Grizzlies' concession in open court on August 12, 1981 "that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry into the professional football market place." The court explained further:

> In an effort to spare all parties the time and expense of what may prove to be unnecessary discovery proceedings, I entered my order of August 13th, which limited discovery "solely to matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee, and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and American Football League". If discovery in this discrete area should reveal that the NFL applied objective standards to the plaintiffs' application, there may not be a need to conduct further discovery.

4 App. at 1085. The trial judge also stated his assumption that there was no need to rule on outstanding discovery requests, since counsel's letter stated that he would be able to reach an accord with defense counsel regarding them. He warned, however, that all discovery must be complete by October 31, 1981, *Id.* at 1086. Fur-

ther correspondence between the parties and the court took place respecting the issues posed by the NFL's motion for summary judgment, and on December 17, 1981 the trial judge by letter reiterated his intention to consider the NFL motion "because if it is undisputed that the defendants used 'objective, rational and fair decisional criteria' in rejecting plaintiff's application, then that may well be the end of the litigation ball game." 4 App. at 1099.

On December 21, 1981 the defendants filed a renewed motion for summary judgment, relying on the pleadings, depositions, answers to interrogatories, admissions on file, and the Rozelle and Rooney affidavits accompanying their initial motion. 4 App. at 901. The brief in support of the renewed motion is not restricted to the question of whether the decision to reject the Grizzlies' application was based on "objective, rational and fair decisional criteria." Rather it relies on the "undisputed facts" in the record made to date with respect to the nature of the professional football business, and asserts that those facts warrant summary judgment for defendants as a matter of law. Thus the renewed motion put the Grizzlies on notice that the defendants were relying upon the summary judgment record as then comprised, and of the obligation to set forth in affidavits the reasons why additional discovery would be necessary in order to oppose it. Fed.R.Civ.P. 56(f).

On March 10, 1982 the Grizzlies filed a 107 page brief in opposition to the renewed motion for summary judgment. 4 App. at 963 et seq. That brief is not limited to the question whether the Grizzlies' application was rejected on the basis of objective rational and fair decisional criteria. It addresses the full range of issues discussed in the defendants' brief in support of the motion. Although the correspondence between counsel and the court was included in an appendix to the Grizzlies' brief, no affidavit was filed setting forth any reason why additional discovery should be afforded before the court ruled on the mo-

tion. Nor was that subject addressed in the brief in opposition to the renewed motion. It surfaced, however, in a Grizzlies' brief in response to defendant's reply brief. Responding to the defendants' contention that the members of the NFL are not competitors, but are engaged in a joint venture in the promotion of an entertainment spectacle, the Grizzlies argued:

> Nevertheless, despite Defendants' heavy reliance on this argument, the "single entity" issue was *not* the subject of discovery. Indeed, in order to determine whether there is any merit to Defendants' "single entity" contention, the starting point in discovery would be necessarily an examination of the business and financial records of the individual teams. These records would show what part of each team's revenue is not shared by any other team, what activities generated that revenue, and how the revenue was treated on the team's books. Based on these records, Plaintiffs could prove that the teams are not a "single entity."
>
> In addition, other factors or economic competition between the teams would have to be discovered, along with the views of each team about that economic competition. This would entail, (a) a study of the league's operations; (b) an inquiry into the existence of factionalism and voting blocks in league deliberations and at meetings; (c) depositions from representatives of each team; and discovery of a host of other categories of facts which need not be listed here. All of this information would be needed before the Court would have an adequate record on which to make a ruling on Defendants' contentions that the separate teams must be viewed as a single entity for antitrust purposes. It suffices to note that depositions were limited by Court Order to the four members of the 1973 NFL "Expansion Committee", and Pete Rozelle, and that the written

> discovery was confined to the issue of "objective standards". Perhaps it should be noted as well that before the Court entered its August 31, 1981 Order, Plaintiffs had, in fact, filed discovery requests seeking information which would have shed light on Defendants' "single entity" contention, but Defendants objected to all of this discovery. Therefore, the record does not contain evidence for the Court to rule on Defendants' "single entity" contention.

5 App. at 1217-18. This brief made no reference to specific discovery requests addressed to what the Grizzlies characterize as defendants' "single entity" contention. There is no suggestion that there are sources of revenue other than sales of tickets, sales of television rights, and revenues derived from food and beverage concessions, parking, and sales of team paraphernalia. There is no indication that a professional football business located at Memphis, Tennessee would compete with any NFL member for these peripheral sources of revenue. The Grizzlies do not contend that the league members (or the Grizzlies themselves if they were admitted to the league) compete for rather than share in network television and ticket sale revenues.

[1, 2] The trial court addressed the Grizzlies' unfocused contention that there should be additional discovery, noting:

> Plaintiffs have had more than sufficient discovery to fully develop their case. All of the outstanding requests to which defendants have refused to respond are not calculated to lead to relevant evidence necessary to resolving this matter. As a result I find that this case is now ripe for a decision on the merits.

550 F.Supp. at 565.

The Grizzlies contend that this ruling was error, because with additional discovery they could have discovered facts which would suggest the existence of actual

or potential competition between their Memphis based team and members of the NFL in some relevant product market.

Where Rule 56(f) affidavits have been filed, setting forth specific reasons why the moving party's affidavits in support of a motion for summary judgment cannot be responded to, and the facts are in the possession of the moving party, we have held that a continuance of the motion for purposes of discovery should be granted almost as a matter of course. *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir.1977); *Ward v. United States*, 471 F.2d 667, 672 (3d Cir.1973). But as Judge Friedman so aptly observed:

> It is true that Rule 56(f) also authorizes the court in appropriate cases to refuse to enter summary judgment where the party opposing the motion shows a legitimate basis for his inability to present by affidavit the facts essential to justify his opposition, but to take advantage of this provision he must state by affidavit the reasons for his inability to do so and these reasons must be genuine and convincing to the court rather than merely colorable. It is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts. In the world of speculation such doubts have an honored place, but in the daily affairs of mankind and the intensely practical business of litigation they are put aside as conjectural.

Robin Construction Company v. United States, 345 F.2d 610, 614 (3d Cir.1965). Judge Friedman's observations are relevant here in two respects. First, the Grizzlies filed no Rule 56(f) affidavit.[4] Second, treating

4. Most courts which have considered the issue agree that filing an affidavit is necessary for the preservation of a Rule 56(f) contention that summary judgment should be delayed pending further discovery. *See, e.g., Gray v. Udevitz*, 656 F.2d 588 (10th Cir.1981);

their response to the defendants' reply brief as if it were such an affidavit, it raises no more than a merely colorable claim that actual or potential competition for revenue other than from ticket sales and sales of television rights could be shown between a professional team based in Memphis and the other members of the NFL. Just how speculative the Grizzlies' Rule 56(f) showing was, even assuming that it should be considered absent an affidavit, can be appreciated from the analysis, in the margin, of the outstanding discovery requests, the defendants' objections, and this court's conclusion as to their relevance to the issue of competition.[5]

NOTE — *(Continued)*

Thi-Hawaii v. First American Financial Corp., 627 F.2d 991 (9th Cir.1980); *Over the Road Drivers v. Transport Insurance Co.*, 637 F.2d 816 (1st Cir.1980); *British Airways Board v. Boeing Company*, 585 F.2d 946 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979); *Altemose Construction Company v. Building and Construction Trades Council of Philadelphia*, 443 F.Supp. 492, 498 (E.D.Pa.1977); *Mayerson v. Washington Mfg. Co.*, 58 F.R.D. 377 (E.D.Pa.1972). *But see Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.1973), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1974) (continuance granted "[o]ut of an abundance of caution and to prevent a possible injustice" despite absence of affidavit); *Murrell v. Bennett*, 615 F.2d 306 (5th Cir.1980) (absence of affidavit excused in prisoner's pro se case).

5. Request	Appellees' Objection	Relevance to Competition Issue
I: #2—4, 6 All documents relating to formal meetings at which appellants' application was discussed.	Beyond Scope of issue	Irrelevant to competition issue — only relevant to "objective standards" issue.
I: #10 Informal meetings of NFL Expansion Committee and Sub-committee; dates, locations, subjects discussed.	Impossible to produce	Relevant to establishing motive for exclusion, not to competition.

Considering the already large record compiled prior to its consideration of the summary judgment record, the absence of a Rule 56(f) affidavit, the irrelevance of

NOTE — *(Continued)*

I: #8(d) All documents relating to possible transfer of NFL teams.	Irrelevant	Arguably relevant, but extremely broad and cumulative of materials in summary judgment record.
II: #5 Identify "specifically provisions in NFL Constitution and By-Laws governing voting procedures for making business decisions."	Contained in by-laws	Provisions are easily identified in summary judgment record.
I: 8(m) Identify all documents relating to the World Football League.	Involves enormous amounts of information. Not reasonably calculated to lead to admissible evidence.	Irrelevant to competition issue. Related only to the retaliation claim.
II: #3 Identify players and coaches in the WFL who subsequently joined the NFL.	Overly burdensome	Irrelevant to competition issue. Relates to retaliation and objective standards issues.
II: #4 State with specificity each administrative and promotional function performed by the NFL.	They are broadly stated in the by-laws. Specific functions are beyond enumeration.	Irrelevant to competition issue.
II: #7 State amounts of NFL assessments against individual members and expenditures against which such assessments were applied.	1) Unduly burdensome. 2) Might lead to disclosure of confidential information. 3) Not reasonably calculated to lead to discovery of admissible evidence.	Irrelevant to competition issue.

most of the pending discovery requests, and the conjectural nature of the Grizzlies' contentions as to the possibility of establishment of actual or potential competition

NOTE — *(Continued)*

II: #8(c),(d) Amount of disbursement of expansion fees from 1966 to present; amount of "assets" contributed to new franchises.	1) Unduly burdensome. 2) No bearing on issues of suit.	Irrelevant to competition issue.
II: #29-30 Specify how plaintiffs' expansion into the NFL would diminish the league's joint assets; identify all specific documents.	1) [General discussion of joint revenue producing assets of NFL: goodwill, League trademarks, etc.] 2) Exact diminution can't be forecast 3) Documents are confidential, burdensome to produce, not relevant.	Irrelevant to competition issue.
III: #1-7 Financial statements and tax returns of each defendant for 1976-1979: all documents revealing terms of operating agreements between defendants and NFL Properties, Inc.; all contracts by defendants or by NFL Properties, Inc. concerning broadcast rights and stadium leases.	1) Irrelevant. 2) Documents are confidential. Production not justified by any compelling necessity.	Plaintiffs advance five reasons for requesting these documents. See Motion to Compel, App. at 125a. Only one of these reasons is relevant: the financial data is relevant to plaintiffs' allegation that the defendants are engaged in conspiratorial, anti-competitive activities. However, the request is otherwise unnecessarily broad, and the information could be obtained in other ways.

in any arguably relevant market, we conclude that the court did not err in considering the motion for summary judgment on the present record.

IV.
The Merits

A. *Sherman Act Section 1*

Public Law 89-800 establishes as a matter of law that the merger which produced the NFL from two for-

NOTE — *(Continued)*

II: #6 State with particularity all facts relating to use of voting procedures in context of plaintiffs' application.	Information is in documents relating to plaintiffs' application.	Irrelevant to competition issue. Related to "Objective standards" issue.
II: #12 Identify all documents that relate to any interest or concern of defendant in locating or relocating a franchise in Mid-South/Memphis area.	NFL has already produced this.	Relevant, since this would establish element of competition between plaintiff and defendant for geographical market. But all that the plaintiffs ask for in their motion to compel is that the NFL deny the existence of any more documents under oath. This is not likely to lead to material facts. See Motion to Compel, App. at 108a.
II: #33 Whether any suits have been filed relating to the Tampa expansion.	Doesn't relate to appellants' application.	Irrelevant to competition issue. Goes to objective criteria question.
II: #34 Give all information relating to transfers of ownership interests from 1959 to present.	Beyond scope of suit.	Irrelevant to competition issue. Goes to objective criteria question.

merly competing leagues did not violate the antitrust laws. Public Law 87-331 establishes as a matter of law that the members may lawfully pool revenues from the sale of television rights. The parties agree that in other

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NOTE — *(Continued)*

IV: #1-9, 15-22 This set includes requests for all recent opinion polls and market surveys for each NFL team, all documents concerning correspondence between a member and a fan, season ticket holder mailing lists for 15 teams, all documents relating to trademark licensing, all documents relating to local broadcast rights, "any document concerning the identification . . . of a statistic regarding to number of players from any given team defendant who played in the Pro-Bowl . . .", etc.	". . . a 'fishing expedition' of the worst kind. . . ." Defendants' Objections to Plaintiffs' Requests for Production of Documents Set No. 4 at 3. [Not in appendix].	There may be documents in this request that would tend to suggest the possibility of competition for the Memphis home team market. However, the request is extraordinarily broad, and no showing was made that anything would be likely to impeach the provision in Art. 9.1(B)(1) of the Constitution and By-Laws of the NFL prohibiting a member club from having a financial interest, directly or indirectly, in any other league member.
V: #2,3,6,12,13 All documents relating to expansion decisions, including all documents relating to designation of Paul Brown as operator of the Cincinnati Bengals.	———	Irrelevant to competition issue.

respects a rule of reason analysis is appropriate.[6] The Grizzlies, moreover, make no contention that the 60-40 sharing of ticket sale revenue is an unreasonable restraint of trade.

[3] Under a rule of reason analysis a Section 1 violation and a right to recover under Section 4 of the Clayton Act can be established by proof:

> (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Request	Appellees' Objection	Relevance to Competition Issue
VI: #2(a), (b), (c), 8, 13-15, 24 All minutes and notes of each participant at any meeting concerning expansion, labor unrest, antitrust problems, etc.; all studies of the college draft; all studies of effect of further expansion; all documents "reflecting any TV rating concerning any defendant . . .", all documents reflecting amount of gate receipts; stadium leases for each defendant between 1972 and 1979.	———	Irrelevant to competition issue.

6. In the complaint the Grizzlies alleged that their exclusion was the result of a group boycott, which was a per se violation of Section 1 of the Sherman Act. The per se violation contention is not made in this court.

Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 147 (3d Cir. 1981), *cert denied*, 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982), quoting *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978). In this case there is no dispute about the requisite concert of action among the defendants. The defendants do deny injury to competition in any relevant market from their rejection of the Grizzlies' application. They urge that any limitations on actual or potential competition in any relevant market were insulated from antitrust scrutiny by the 1961 and 1966 statutes referred to, or, are reasonable as a matter of law. They also urge that as a matter of law there was no competition among league members or between league members and non-members in other markets to which the Grizzlies point.

The Grizzlies identify as the relevant product market major-league professional football, and as the relevant geographic market the United States. The trial court found these markets to be relevant. 550 F.Supp. at 571 n. 33. The court observed as well that "[there is no doubt that the NFL currently has a monopoly in the United States in major league football." 550 F.Supp. at 571. The Grizzlies pose as the question on this appeal "whether it can be said as a matter of law that defendants neither acquired nor maintained monopoly power over any relevant market in an unlawful manner." Appellants' Brief at 27.

As to the acquisition of dominant position and monopoly power, the facts are undisputed. Long before the Grizzlies and the World Football League came into existence, Congress authorized the merger of the two major football leagues extant in 1966, and granted to the merged league the power to pool television revenues. That congressional decision conferred on the NFL the market power which it holds in the market for professional football. Congress could not have been unaware that necessary effect of the television revenue sharing scheme which it approved for the NFL would be that all members of that league would be strengthened in their ability to bid for the best available playing and coaching personnel, to the potential disadvantage of new entrants.

[4] In an effort to bolster its "unlawful acquisition of monopoly power" contention, however, the Grizzlies point to certain activities of the NFL and its predecessors which occurred prior to the 1966 legislation authorizing its formation. They point out that in 1961, when the old NFL was seeking legislation which would overrule *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa. 1953), which prohibited certain television revenue sharing practices, it admitted a new team in Minnesota, the home state of the Senate Majority Leader and Chairman of the Committee which considered the bill; that in 1966 when the old NFL and AFL leagues were seeking a statutory exemption which would permit their merger, a team was added in New Orleans, the home state of a powerful senator and powerful congressman who supported the legislation. Even the post merger addition of Seattle and Tampa Bay, according to the Grizzlies, was prompted by a desire to limit the term of proposed legislation prohibiting home teams from blacking out televised games when they were playing. See Pub.L. 93-107, §1, 87 Stat. 350, repealed by Pub.L. 93-107, §2, 87 Stat. 351 (1973). If these allegations are true, as we must assume for purposes of a summary judgment motion, they are, perhaps,

instructive on the nature of the federal legislative process. For purposes of rule of reason analysis, however, they are irrelevant. It would take a court bolder than this to claim that the congressionally authorized acquisition of market power, even market power amounting to monopoly power, was unlawful under Section 1 of the Sherman Act.

But, the Grizzlies urge, the 1966 statute did not confer the authority to abuse the market power, even though it may have authorized its acquisition. Rather, the merger was approved only "if such agreement increases rather than decreases the number of professional clubs so operating." 15 U.S.C. §1291. Paraphrasing their argument, it is the Grizzlies' contention that the statute which authorized NFL acquisition of monopoly power in the professional football market required not only that the league members refrain from abusing that power against potential competitors, but that it take affirmative steps to shre its market power with others.

This reading of the 1966 legislation is at least plausible. It poses two separate issues. One is the issue of abuse of monopoly power against potential rivals of the NFL in the business of promoting professional football as a spectator spectacle. The other is the issue of admitting others to a share in the NFL's dominant market position. Although the Grizzlies' briefs, both here and in the district court, tend to blur the distinction between those issues, the complaint makes clear that only the second is presented in this case. The only basis on which the Grizzlies seek recovery under Section 4 of the Clayton Act is that they were denied admission to the monopoly, and thus were deprived of a share of the NFL's monopoly power. No claim is made that abuse of NFL market power led to the demise of the World Football League, and no issue is before us concerning activities of the NFL, since that demise, which may have inhibited the development of competition by another football league. The NFL structure as a barrier to entry to the

market by another football league is relevant in this case only to the extent that it bears on the obligation to permit entry to the NFL.[7]

There are two possible sources of any NFL obligation to permit entry to its shared market power: the 1966 statute, and the Sherman Act. Each will be considered separately.

[5] The provision in the 1966 statute that "such agreement increases rather than decreases the number of professional football clubs so operating" cannot reasonably be construed as addressing competition, the preservation of which is the object of the Sherman Act. The basic thrust of the 1966 statute is to authorize an arrangement which eliminated competition among the only two viable competitors then in the professional football market. The reference to an increase in the number of professional football teams "so operating" is a reference to professional teams operating under the antitrust exemption for television revenue sharing provided in the 1961 statute. Thus what the 1966 statute suggests is that more home team territories would be added, not to increase competition in professional football, but to permit geographic enlargement of the NFL's market power.

The Grizzlies urge that home team regions derive important economic benefits from the presence of a professional football team, in the form of hotel, restaurant and travel business, stadium employment, and the like. Undoubtedly that is so, and probably such derivative economic benefits were in the minds of those Senators and Congressmen interested in NFL expansion. Those benefits, however, do not result from competition with the NFL or even from competition, other than athletic,

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7. There is no doubt that the NFL structure authorized by the 1961 and 1966 legislation in itself presents a formidable barrier to entry by a competitive football league. That legally countenanced barrier might well, if abused against extra-league competitors, result in anti-trust liability. But the issue of competition by another league is not presented here, except to the limited extent noted.

among its members. Rather they result from the presence of a franchisee which shares the NFL market power over professional football. Moreover, even if one assumes that Congress intended in the 1966 statute to extend incidental economic benefits on businesses in new home territory areas, it is difficult to see what standing the Grizzlies have to rely on that intent with respect to their claim for league membership. Finally, even if there was a congressional intent to confer economic benefits in some new home territories, nothing in the 1966 statute or its square legislation history suggests a basis for concluding that businesses in Memphis, Tennessee, rather than in other metropolitan areas were to receive them.

[6] Since the 1966 statute is not directed at preservation of competition in the market for professional football, and cannot be construed as conferring any economic benefit on the class to which the Grizzlies belong, we conclude that it does not oblige the NFL to permit entry by any particular applicant to the NFL shared market power.

We turn, therefore, to the Sherman Act. As noted above, Sherman Act liability requires an injury to competition. In this case the competition inquiry is a narrow one, because the Grizzlies are not seeking recovery as potential competitors *outside* the NFL. They identify as the antitrust violation the league's negative vote on their application for membership.

From affidavits, pleadings, and discovery materials which comprise the summary judgment record it could be found, and the trial court assumed, that the Grizzlies met all the qualifications for membership specified in the NFL Constitution and By-Laws. 550 F.Supp at 568. It is undisputed that in 1974 expansion teams were located at Tampa, Florida and at Seattle, Washington, raising to 28 the number of league competitors for the 1976 season. It is also undisputed that in deciding on expansion the NFL Expansion Committee considered a so-

cioeconomic study prepared for it by the Stanford Research Institute in December of 1978, which identified fourteen potential locations for new franchises, including Memphis[8] The Expansion Committee met with representatives of the Grizzlies, but made a negative recommendation on expansion, as of 1975, beyond 28 teams. The full membership of the league accepted the recommendation of the expansion committee.

The NFL's stated reasons for rejecting the Grizzlies' application included scheduling difficulties created by the presence of an odd number of teams, a long-running collective bargaining dispute with league players, several pending antitrust lawsuits, and league concern over legislation prohibiting television blackouts in home team territories, all of which allegedly made consideration of expansion unpropitious. The Grizzlies contend that there are material issues of disputed fact as to the accuracy of these reasons. They contend that at trial they could prove that the motivation for their rejection was to punish them for having attempted in the past to compete with the NFL in the World Football League, or to reserve the Memphis location for friends of present league team owners.

[7-9] Assuming, without deciding, that the summary judgment record presents disputed fact issues with respect to the actual motivation of the NFL members, those disputed facts are not material, under Section 1 of the Sherman Act, if the action complained of produced no injury to competition.

As to competition with NFL members in the professional football market, including the market for sale of television rights, the exclusion was patently pro-com-

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8. The other areas are Mexico City, Birmingham, Alabama, Seattle, Washington, Nassau County, New York, Anaheim, California, Chicago, Illinois, Phoenix, Arizona, Honolulu, Hawaii, Tampa, Florida, the Tidewater area of Virginia, Charlotte-Greensboro, North Carolina, Indianapolis, Indiana, and Orlando, Florida.

petitive, since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise, and it left the Grizzlies' organization as a potential competitor in such a league. If there was any injury to competiton, actual or potential, therefore, it must have been to intra-league competition.

The NFL defendants' position is that the summary judgment record establishes conclusively the absence of competition, actual or potential, among league members. Rather, they urge, the league is a single entity, a joint venture in the presentation of the professional football spectacle.

For the most part the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members. Indeed it is undisputed that on average more than 70% of each member club's revenue is shared revenue derived from sources other than operations at its home location. The Grizzlies do not challenge the legality of the NFL's revenue sharing arrangements, and seek to participate in them. The Grizzlies emphasize that there nevertheless remains a not insignificant amount of intra-league non-athletic competition. We need not, in order to affirm the summary judgment, accept entirely the NFL's position that there is no intra-league competition. Conceivably within certain geographic submarkets two league members compete with one another for ticket buyers, for local broadcast revenue, and for sale of the concession items like food and beverages and team paraphernalia.[9] Thus rejection of a franchise application in the New York metropolitan area, for example, might require a different antitrust analysis than is suggested by this record. But the Grizzlies were obliged, when faced with the NFL de-

9. Thus we need not, in order to affirm, approve the suggestion in *Levin v. National Basketball Ass'n.*, 385 F.Supp. 149, 152 (S.D.N.Y.1974), that there can never be competition among league members.

nial of the existence of competition among NFL members and a potential franchisee at Memphis, to show some more than minimal level of potential competition, in the product markets in which league members might compete. They made no such showing. The record establishes that the NFL franchise nearest to Memphis is at St. Louis, Mo., over 280 miles away. There is no record evidence that professional football teams located in Memphis and in St. Louis would compete for the same ticket purchasers, for the same local broadcast outlets, in the sale of team paraphernalia, or in any other manner.

The Grizzlies contend on appeal, although they did not so contend in the trial court, that league members compete in what they call the "raw material market" for players and coaching personnel. Entirely apart from the propriety of considering a legal theory not presented in the trial court,[10] there are major defects in this Grizzlies' argument. First, the Grizzlies exclusion from the league in no way restrained them from competing for players by forming a competitive league. Second, they fail to explain how, if their exclusion from the league reduced competition for team personnel, that reduction caused an injury to the Grizzlies' business or property. See *Van Dyk Research Corp. v. Zerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). (Section 4 plaintiff has burden of proving that injury was caused by illegality relied on).

One final Grizzlies' argument in support of their section 1 Sherman Act claim bears mentioning. Relying on the essential facilities doctrine developed in cases

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10. *See Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 639 (3d Cir.) (in banc), *cert. granted*, 457 U.S. 1131, 102 S.Ct. 2956, 73 L.Ed.2d 1348 (1982); *Caisson Corp. v. Ingersoll Rand Co.*, 622 F.2d 672, 680 (3d Cir. 1980); *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399, 401 (3d Cir. 1980); *Toyota Industrial Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.2d 465 (3d Cir. 1979).

such as *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), and *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952), they urge that because the NFL is a practical monopoly it had an obligation to admit members on fair, reasonable, and equal terms, absent some procompetitive justification for their exclusion. This Grizzlies argument suffers from the same defect as the others. The essential facilities doctrine is predicated on the assumption that admission of the excluded applicant would result in additional competition, in an economic rather than athletic sense. The Grizzlies have simply failed to show how competition in any arguably relevant market would be improved if they were given a share of the NFL's monopoly power.

Since on the record before us the Grizzlies have shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise, they cannot succeed on their section 1 Sherman Act claim.

B. *Sherman Act Section* 2.

The Grizzlies also plead a violation of Section 2 of the Sherman Act, 15 U.S.C. §2 (1973). That section prohibits attempts to monopolize. In section 2 cases the alleged monopolist is prohibited from acting "in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals. . . ." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 (6th Cir. 1979). *See also Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 926-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917, 101 S.Ct. 1962, 67 L.Ed.2d 343 (1981) (Federal Trade Commission Act §5 claim); *Mid Texas Communications v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1387 (5th Cir. 1980), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1981).

[10] Our analysis of the section 1 Sherman Act claim applies equally to the Grizzlies' section 2 claim. Congress by legislation in 1961 and 1966 authorized the NFL acquisition of the market power which it holds, and the Grizzlies cannot challenge that acquisition. The only action they complain of is their exclusion from the shared monopoly, but they have failed to show that their admission would be contra-competitive in any way. Indeed the Memphis home team market has been left by the NFL for potential competitors. Thus on this record summary judgment on the section 2 Sherman Act claim was also proper.

Conclusion

The court did not err in considering the defendants' summary judgment motion on the present record. There are no disputed fact issues material to the legal issues presented. The trial court did not err in applying the Sherman Act. Thus the judgment appealed from will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MID-SOUTH GRIZZLIES, et al.	:	CIVIL ACTION
v.	:	
NATIONAL FOOTBALL LEAGUE, et al.	:	No. 79-4373

ORDER

AND NOW, this 5 day of NOVEMBER, 1982, upon consideration of Defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, it is hereby

ORDERED

that the motion is GRANTED and judgment is entered in favor of the defendants and against the plaintiffs.

BY THE COURT

JOSEPH L. McGLYNN, Jr. *J.*

MID-SOUTH GRIZZLIES, et al.
v.
NATIONAL FOOTBALL LEAGUE, et. al.
Civ. A. No. 79-4373.
United States District Court,
E.D. Pennsylvania,
Civil Division.
Nov. 5, 1982.

Unsuccessful applicants for a National Football League franchise for the Memphis, Tennessee area brought Sherman Act suit against the League. The League moved for summary judgment. The District Court, McGlynn, J., held that: (1) rule-of-reason test applied; (2) neither essential-facility doctrine nor the trade association cases were applicable; (3) a Section 1 violation had not been made out; and (4) although the League currently has a monopoly in the United States in major league football it had not used that power to prevent formation of the rival league or fielding of a team in Memphis.

Motion granted.

1. Federal Civil Procedure [KEY] **2543**

Summary judgment is a drastic remedy and a court must resolve all doubts as to existence of genuine issues of fact against the movant and must view all inferences from the facts in the light most favorable to the opposing party. Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

2. Federal Civil Procedure [KEY] **2484**

Summary judgment should be used sparingly in antitrust cases. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

3. Federal Civil Procedure [KEY] **2484**

Although a party's right to trial should be carefully guarded, filing of an antitrust complaint cannot insure a right to trial, i.e., defeat a summary judgment motion,

absent any significant probative evidence supporting the party's claims and such a party should not be permitted to proceed to trial in the hope of developing evidence to support his claims. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ. Proc. Rules 56, 56(c), 28 U.S.C.A.

4. Federal Civil Procedure [KEY] **2484**

Summary disposition of antitrust cases is proper even when employing the rule of reason. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ. Proc. Rules 56, 56(c), 28 U.S.C.A.

5. Federal Civil Procedure [KEY] **1267**

District court has discretion in controlling the discovery process.

6. Federal Civil Procedure [KEY] **1272**

Where appropriate, a district court may limit a party's discovery as long as he is able to fully develop his case.

7. Monopolies [KEY] **12(6)**

Unlike professional baseball, professional football is not totally exempt from the antitrust laws and in two areas only does football escape the antitrust laws' watchful eye: joint agreement concerning the telecasting of games and the 1966 merger of the AFL with the NFL. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; 15 U.S.C.A. §§1291–1295.

8. Monopolies [KEY] **12(1.2)**

Not all group decisions refusing to do business with someone should be measured against the strict per se criteria and per se violations should be found only where the involved agreements are so clearly anticompetitive and lacking in any redeeming quality that they can be conclusively presumed illegal without further inquiry. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

9. Monopolies [KEY] **12(6)**

Because of the unique character of professional sports courts have rejected the per se test and have routinely applied the Rule of Reason in deciding antitrust suits concerning league practices. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

10. Monopolies [KEY] **12(1.10)**

The "Rule of Reason test" mandates that a court determine whether the restraint imposed merely regulates and thereby promotes competition or is one that may suppress or destroy competition. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

See publication Words and Phrases for other judicial construction and definitions.

11. Monopolies [KEY] **12(1.10)**

Crucial to proving an antitrust violation under the rule-of-reason test is a showing of anticompetitive intent or effect. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

12. Monopolies [KEY] **28(8)**

Even where state of mind is material in an antitrust case, there must be some demonstration that there is a sufficient quantum of evidence to permit a party to go to the jury. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

13. Monopolies [KEY] **12(1.2)**

The essential-facility doctrine is applicable in an antitrust case only where a party is being denied access to something necessary for that party to engage in business which is controlled by his competitors. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

14. Monopolies [KEY] **12(6)**

The essential-facility doctrine was not applicable in antitrust suit challenging professional football league's refusal to accept application for a new franchise. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

15. Federal Civil Procedure [KEY] **2542**

Judicial notice may be used in resolving a motion for summary judgment. Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

16. Monopolies [KEY] **12(18)**

Because the potential harm to outsiders is so great when their competitors are brought together through a trade association the law requires access to the group be available to anyone who meets fair criteria. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

17. Monopolies [KEY] **12(6)**

Trade association antitrust cases were inappropriate in determining antitrust violation by refusal of professional football league to accept franchise application in that production of professional sports necessarily requires joint planning and decision making and unlike normal business competitors the teams are interdependent and while economic success of one team does not necessarily mean the success of another member the stability which is derived from membership in a league produces a better product which is to the benefit of the public at large and the teams do not compete in the same manner as the independent businesses in the trade association. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

18. Monopolies [KEY] **12(6)**

Refusal of professional football league to grant franchise for the Memphis, Tennessee area did not constitute unreasonable restraint of trade in violation of Sherman Act. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

19. Monopolies [KEY] **12(1.3)**

Possession of monopoly power in a relevant market alone is not enough to establish an antitrust violation. Sherman Anti-Trust Act, §2, 15 U.S.C.A. §2

20. Monopolies [KEY] **12(1.3)**

Antitrust laws were not intented to punish a business that has become a monopoly because of a superior product, business acumen or historic accident but the law does require that a monopoly not abuse its power and where business possessing monopoly power wilfully acquires or maintains such power it will incur a penalty. Sherman Anti-Trust Act, §2, 15 U.S.C.A §2.

21. Monopolies [KEY] **12(1.2)**

To avoid a Sherman Act violation, a monopoly must refrain at all times from conduct directed at smothering competition and, put another way, a monopoly abuses its power when it behaves in an unreasonably exclusionary mannor vis-a-vis rivals or potential rivals.

22. Monopolies [KEY] **12(6)**

Although National Football League currently has a monopoly in the United States in major league football, its refusal to accept application for franchise for Memphis, Tennessee area did not violate Sherman Act as franchise applicants were still free to promote a rival league and NFL's actions did not prevent formation of the rival league or the feilding of a team in Memphis. Sherman Anti-Trust Act, §2, 15 U.S.C.A §2.

Richard A. Sprague, Edward H. Rubenstone Sprague, Goldberg & Rubenstone, Gary Green, Robert A. Davitch, Sidkoff, Pincus, Greenberg & Green, Philadelphia, Pa., for plaintiffs.

Edwin P. Rome, Morris L. Weisberg, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., Hamilton Carothers, James C. McKay, Washington, D.C., for defendants.

MEMORANDUM OF DECISION

McGLYNN, District Judge.

Pending before the court is Defendants' Motion for Summary Judgment. Although the submissions regarding the motion are voluminous, they in essence address one issue: does a professional sport league's refusal to accept for membership a qualified applicant for a franchise in an area where no current league team is located violate Sections 1 or 2 of the Sherman Act? Based on the undisputed material facts and the reasons set forth below, I believe not. Therefore, Defendants' Motion for Summary Judgment is granted.

The Team Rosters

The offensive team (plaintiffs) is the Mid-South Grizzlies, a joint venture established on November 1, 1975 consisting of the Mid-South Grizzlies, a Tennessee limited partnership,[1] Consolidated Industries, Inc., a California corporation, and John Edward Bosacco, an individual. The defensive lineup (defendants) is composed of the National Football League ("NFL"), the twenty-eight individual NFL football teams, and calling the signals, Pete Rozelle, the NFL Commisioner.

Plaintiffs' Game Plan

In the fall of 1975, plaintiffs applied to the NFL in the hope of obtaining a franchise for the Memphis, Tennessee area. Along with their application, they submitted an application fee as required by the NFL Constitution and By-Laws. This fee was returned to the plaintiffs a few weeks later. In December 1975, plaintiffs met with the NFL Expansion Committee. This committee was responsible for the investigation and planning for the addition of new NFL teams. Its members at the time of plaintiffs' application were Daniel M. Rooney, President of the Pittsburgh Steelers, Gerald H. Phipps of the Denver

1. The partnership's Chief Executive Officer is John F. Bassett.

Broncos, Louis Spadia of the San Francisco '49ers and Texas Schramm of the Dallas Cowboys. At this meeting plaintiffs were told that further expansion of the NFL at that time was in their opinion unwise and that they would recommend to the full NFL membership that no further expansion be considered for the moment.

Plaintiffs met with defendants on at least two more occasions. One of these meetings was with the entire NFL membership. A few months after their presentation to the full membership, the NFL passed on March 17, 1976 the following resolution:

> RESOLVED, after thorough review of the major problems presently confronting the NFL, that the member clubs do not believe they can formally commit to specific expansion arrangements at this time. The clubs do, however, reaffirm their desire to bring total League membership to thirty teams as soon as possible after resolution of current problems and assimilation of the new Tampa Bay and Seattle teams. At that time, Memphis and Birmingham, which have most actively sought admission in recent months, will be among the cities receiving strongest consideration for NFL franchises.

The problems referred to in the resolution were many. Around the time of plaintiffs' application, no collective bargaining agreement with the Players Association had been in effect for two seasons. In addition a district court in California had held several player restrictions to be unlawful.[2] A few months later another district court in California enjoined application of the "Rozelle rule" by the NFL. Pending in a third district

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2. The court found the "Rozelle rule," the "draft rule," the "one-man rule" and the "tampering rule" violative of the Sherman Act. *Kapp v. National Football League*, 390 F.Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

court was a case attacking the NFL college draft.[3] Near the end of 1975, another district court found the "Rozelle rule" unlawful.[4] Also during this time period efforts were afoot to make permanent legislation which prevented the practice of blacking out television coverage of sold out home games in the area surrounding the home team's stadium. In addition, the NFL Players Association threatened to challenge the procedures the NFL implemented to man the new Tampa Bay and Seattle teams.[5] The players filed suit in March 1976.[6]

Because defendants had already decided expansion anywhere at the time of plaintiffs' application was not prudent, they never fully considered plaintiffs' application on the merits.[7] Defendants did, however, tell plain-

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3. *Smith v. Pro-Football, Inc.*, 420 F.Supp. 738 (D.D.C.1976), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C.Cir.1978).

4. *Mackey v. National Football League*, 407 F.Supp. 1000 (D.Minn.1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

5. These franchises were awarded in 1974. They did not begin actual play, however, until 1976. In order to man these new teams, each one was permitted to draft up to three men from each existing team except a minimum of thirty-two men placed on a protected list. They were also given preferential selection rights in the NFL college draft. Exhibit 4F to Rooney Affidavit, Motion of Defendants for Summary Judgment and Addenda.

6. The NFL's litigation problems have continued. Recently, the Second Circuit affirmed a district court's finding that the NFL cross ownership ban preventing NFL owners from owning any other major professional sports team violated the Sherman Act. *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.1982), *cert. denied*, __ U.S. __, 103 S.Ct 499 (1982). In May 1982, the NFL also lost a fight to prevent the owner of the Oakland Raiders from moving his team to the Los Angeles area. *Los Angeles Memorial Coliseum Commission v. National Football League*, Civ. No. 78-3523-HP (C.D.Cal.). And of serious consequence to the owners, players' strike which began in September 1982.

7. As a result of this lawsuit, defendants have since examined the merits of plaintiffs' application and have found it, in their eyes,

tiffs they would receive serious consideration in the future when definite expansion plans were formulated.

Plaintiffs finally filed this lawsuit in December 1979. In their Complaint, plaintiffs allege that part of defendants' motive in rejecting plaintiffs' application was to retaliate against plaintiffs for their past involvement in the now defunct rival of the NFL, the World Football League ("WFL").[8] The WFL was formed in 1973 and played games in the entire 1974 football season and in the 1975 season until October 1975. Several of its teams had competed directly with NFL teams for fan support and revenue.

In any event plaintiffs assert that defendants' actions constitute an unlawful group boycott and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[9] Moreover, they allege that defendants' behavior constitutes monopolization violative of Section 2 of the Sherman Act.[10]

The Defensive Strategy

Defendants respond with several defenses. First they deny their actions were motivated by animus towards plaintiffs because of their WFL involvement. De-

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NOTE — *(Continued)*

wanting. Because I am assuming plaintiffs were qualified for a franchise in deciding this motion, I make no finding regarding this particular contention of defendants.

8. Mr. Bosacco owned and operated the Philadelphia Bell; the limited partnership owned and operated the Memphis Southmen, also known as the Memphis Grizzlies; and Consolidated owned and operated the Portland Storm.

9. Section 1 reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . ."

10. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . ."

fendants also contend that their behavior was neither a group boycott nor an unreasonable restraint of trade. In addition they assert there was no contract, combination or conspiracy as required by Section 1 because the NFL, in this case, acted as a single entity. Moreover, they assert they have performed no act of monopolization proscribed by Section 2. Lastly, they contend that plaintiffs Bosacco, Consolidated and the joint venture are not real parties in interest and thus lack standing to sue. Because I find that defendants' conduct is neither an unlawful group boycott, an unreasonable restraint of trade nor an act of monopolization, I will not make a call on defendants' remaining contentions.[11]

The Pregame Show

The NFL is well known to any football fan. It is an unincorporated association comprised of twenty-eight teams located throughout the United States. All but one team are privately owned and operated. Although these teams "compete" with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies. For example, they set rules for the games, schedule contests, provide for joint marketing of national broadcast rights and, of importance here, decide the locations and owners of new franchises.[12] The rules which govern the awarding of new franchises are contained in the NFL's Constitution and By-Laws.[13]

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11. The Second Circuit on facts different from this case recently rejected the single entity theory in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 499 (1982).

12. An award of a new franchise requires three-quarters approval of the then existing franchises. Constitution and By-Laws for the National Football League for 1975, ¶3.3(C).

13. The Constitution and By-Laws for the National Football League at the time of plaintiffs' application contained the following provisions governing the awarding of a franchise:

Each team derives a great deal of its revenue through jointly generated income. For example, money resulting from national broadcasting contracts is shared among league members on agreed upon formulae. Other revenue, such as the sale of team paraphernalia and local

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NOTE — *(Continued)*

3.1(a) Membership in the League shall be limited to the twenty six (26) member clubs specified in Section 4.3(A) hereof and such new members as may be thereafter duly elected.

(b) The admission of a new member within the home territory of a club is prohibited unless approved by the unanimous consent of all members of the League.

3.2 Any person, association, partnership, corporation, or other entity of good repute organized for the purpose of operating a professional football club shall be eligible for membership except:

(a) No corporation, association, partnership or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership.

3.3(A) Each applicant for membership shall make a written application to the Commissioner. Such application shall describe the type of organization and shall designate the city in which the franchise of the applicant shall be located; such application shall further describe and contain the following information:

(1) The names and addresses of all persons who do or shall own any interest or stock in the applicant, together with a statement that such persons will not own or hold such interest or stock for the benefit of any undisclosed person or organization.

(2) A detailed balance sheet of such company as of the date of organization and a pro forma statement as of the time it shall commence actual operation. A written financial statement shall be required from the applicant and from anyone owning an interest in any applicant, including stockholders and partners.

(3) If applicant is a corporation, a certified copy of the Articles of Incorporation, By-Laws and share certificate shall accompany such application provided, however, if the organization of such corporation has not been commenced or completed a detailed statement summarizing the proposed plan of operation and the capital structure thereof shall be furnished.

advertising, is individually generated and not shared with other NFL members.

The NFL has its roots early in this century. Throughout the years several other leagues appeared usually only for a short time and without much success. One entry, however, did succeed. In the early 1960's the American Football League ("AFL") was formed with eight teams. The two leagues were run separately until 1966 when the two agreed to a merger to be fully imple-

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NOTE — *(Continued)*

(4) If applicant is partnership [sic], unincorporated association or other entity, certified copy of the Articles of Co-Partnership or organization government agreement shall accompany such application.

(5) The names and addresses of all officers and directors.

(6) All applications shall contain a representation that upon acceptance, the applicant will subscribe to and agree to be bound by the Constitution, By-Laws, Rules and Regulations of the League and any amendments or modifications thereof.

(B) Each application for membership shall be accompanied by a certified check for Twenty-Five Thousand Dollars ($25,000.00). Upon approval of any application for membership, an additional Twenty-Five Thousand Dollars ($25,000.00) shall be paid to the League. If any application for admission is rejected, the League shall repay to the applicant the sum of Twenty-Five Thousand Dollars ($25,000.00) paid by the applicant at the time of such application, less all expenses reasonably incurred in connection with the consideration and investigation of such application.

(C) Upon receipt of any application for membership in the League, the Commissioner shall conduct such investigation thereof as he deems appropriate. Following the completion of such investigation, the Commissioner shall submit the application to the members for approval together with his recommendation thereon, and such information thereon that the Commissioner deems pertinent. Each proposed owner or holder of any interest in a membership, including stockholders in any corporation, members of a partnership and all other persons holding any interest in the applicant must be individually approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

mented by 1970.[14] At the time they entered the merger agreement, the NFL had fifteen teams and the AFL had nine.

Expansion beyond these twenty-four teams has been sporadic. In 1967, the NFL awarded a franchise to New Orleans. A year later, the AFL added Cincinnati. By the time the merger was completed, the NFL consisted of twenty-six teams and stayed at that number for several years. In 1974, a year before plaintiffs' application, plans were made to add to two more franchises in Tampa Bay and Seattle. These two teams first became active in 1976, shortly after plaintiffs' application. Each new team was manned by taking a maximum of three players from each previously established team. No new NFL franchise has been awarded to anyone since the time of plaintiffs' application. Although the NFL does expect to award two more franchises in the foreseeable future, they have not decided when, where or to whom.

No current NFL franchise operates in the Memphis area. The closest NFL team location is St. Louis, Missouri which is two hundred and eighty-one miles from Memphis.[15]

The Rules of the Game

[1] Rule 56 of the Federal Rules of Civil Procedure authorizes a district court to enter summary judgment where "the peladings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Only those facts which "tend to prove or disprove elements of the disputed claim for relief" need be examined before a de-

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14. Congress exempted the merger from the antitrust laws. Pub.L. No. 89-800, 80 Stat. 1515 (codified at 15 U.S.C. §1291 (1976)).

15. Mileage was provided by the American Automobile Association.

cision is rendered. *Chuy v. Philadelphia Eagles*, 407 F.Supp. 717, 723 n. 9 (E.D.Pa. 1976), *citing McCormick on Evidence* §185, at 434-35 (2d ed. E. Cleary 1972). The court must recognize, however, that summary judgment is a drastic remedy, resolve all doubts as to the existence of genuine issues of fact against the moving party, and view all inferences from the facts in the light most favorable to the parties opposing the motion. *Continental Insurance Co. v. Bodie*, 682 F.2d 436 (3d Cir. 1982).

[2-4] The Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). However as my former colleague then District Judge, now Circuit Judge, Becker noted, a legion of cases granting either partial or total summary judgment in antitrust cases have been upheld by the Supreme Court and the Third Circuit since Poller.[16] *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F.Supp. 1100, 1140 & n. 53 (E.D.Pa. 1981), *appeal docketed*, Nos. 81-2331, 81-2331, 81-2332 and 81-2333 (3d Cir. Aug. 24, 1981). In fact courts have since recognized that summary judgment is particularly apropos in antitrust cases:

> [T]he very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. . . . If a trial would serve no useful purpose, summary judgment is proper.

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16. One court has stated that the *Poller* case has become the "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions." *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977).

Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 US. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979). *See In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436 (5th Cir. 1982); *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F.2d 389 (5th Cir. 1976). Although a party's right to trial should be carefully guarded, it is nonetheless clear that the filing of an antitrust complaint cannot insure a right to trial absent any significant probative evidence supporting the party's claims. *Harold Friedman, Inc. v. Kroger*, 581 F.2d 1068 (3d Cir. 1978), *citing First National Bank v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). Such a party should not be permitted to proceed to trial in the hope of developing evidence to support his claims. *Parsons v. Ford Motor Co.*, 669 F.2d 308 (5th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). Moreover, summary disposition of antitrust cases is proper even when employing the Rule of Reason. *See Evans v. S.S. Kresge Co.*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977). Thus summary judgment is an appropriate vehicle for disposing of this matter.

Under the special rules of this match-up if the offensive team does not score, the defendants win.

The Kickoff

Defendants first filed their motion for summary judgment in March of 1981. In their initial response and again at oral argument, plaintiffs contended that defendants' motion was premature as plaintiffs had not had the opportunity for adequate discovery.[17] *See Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979). Agreeing that defendants were "offsides", I entered a Memorandum Order

17. At that time plaintiffs had several outstanding discovery requests and had not yet deposed any of the defendants.

permitting plaintiffs to pursue their discovery inquiry but limiting the scope solely to matters relating to the NFL's decision not to grant plaintiffs an NFL franchise in Memphis and to the NFL's prior practices and standards concerning the awarding of new franchises since the NFL-AFL merger.[18] Plaintiffs subsequently received additional material and deposed at length the four members of the expansion committee and Mr. Rozelle.

[5, 6] Defendants renewed their motion for summary judgment in December 1981. Again plaintiffs asserted that still they had not had sufficient discovery. It is well settled that the district court has discretion in controlling the discovery process. *Montecatini Edison S.p.A. v. E.I. du Pont de Nemours & Co.*, 434 F.2d 70 (3d Cir 1970). Where appropriate, a district court may limit a party's discovery as long as they are able to fully develop their case. *Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir. 1982). *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) (summary judgment in antitrust suit affirmed despite petitioner's claim it had been unduly restricted in its discovery).

Plaintiffs have had more than sufficient discovery to fully develop their case. All of the outstanding requests to which defendants have refused to respond are not calculated to lead to relevant evidence necessary to resolving this matter. As a result, I find that this case is now ripe for a decision on the merits.

The First Half

[7, 8] I will first address plaintiffs' Section 1 claim.[19] In the development of antitrust law some cases

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18. Plaintiffs had sought and received a volume of other material from defendants as a result of earlier discovery requests.

19. Unlike professional baseball, professional football does not enjoy the good fortune of being totally exempt from the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972). In two areas only does football escape the antitrust laws'

viewed group boycotts as *per se* violations. *See, e.g., Fashion Originators' Guild of America v. Federal Trade Commission,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *Klors, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). However it became apparent that not all group decisions refusing to do business with someone should be measured against the strict *per se* criteria enunciated in these earlier cases. *See Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). *See also* L. Sullivan, *Handbook of the Law of Antitrust* §90 (1977). *Per se* violations should be found only where the involved agreements are so clearly anticompetitive and lacking in any redeeming quality that they can be conclusively presumed illegal without any further inquiry. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). A threshold question here then is whether the decision of a professional sports league to deny an assertedly qualified applicant a franchise is unquestionably anticompetitive.

[9] Almost twenty years ago, Judge Grim of this court was called upon to decide the legality of the television policies of the NFL in *United States v. National Football League,* 116 F.Supp. 319 (E.D.Pa. 1953).[20] There he pointed out the differences between the production of professional sporting contests and normal business activity:

NOTE — *(Continued)*

watchful eye: joint agreements concerning the telecasting of games; and the merger in 1966 of the AFL with the NFL. 15 U.S.C. §1291 (1976).

20. Group decisions by the NFL concerning the telecasting of their games is now covered by statute. *See* 15 U.S.C. §§1291-95 (1976).

Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

It is particularly true in the National Football League that the teams should not compete too strongly with each other in a business way. The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. There are always teams in the League which are close to financial failure. Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.

Id. at 323. *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462

(E.D.Pa. 1972). The view that the production of professional sports requires joint decisions of the different teams in order to insure their continued existence has become widely recognized. 16F J. von Kalinowski, *Antitrust Laws and Trade Regulation* §50.01 (1982); R. Bork, *The Antitrust Paradox*, Ch. 17, at 332 & 337-38 (1978). The Second Circuit recently reaffirmed this view in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 499 (1982). Although rejecting the NFL's position that there was no Section 1 "contract, combination . . . or conspiracy" because they were a single entity, the court nevertheless recognized the need for joint activity:

> [T]he economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members. . . . In view of this business interdependence team owners, through their leagues, invariably require that the sale of a franchise be approved by a majority of team owners rather than by the selling owner alone.

Id. at 1253. Because of the unique character of professional sports, then, courts have rejected the *per se* test and have routinely applied the Rule of Reason in deciding antitrust suits concerning league practices. *See, e.g., Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir. 1982), *cert. denied* ____ U.S. ____, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); *North American Soccer League v. National Football League, supra; United States Trotting Association v. Chicago Downs Association*, 665 F.2d 781 (7th Cir. 1981); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith v. Pro-Football, Inc.* 593 F.2d 1173 (D.C.Cir. 1979); *Mackey v.*

National Football League, 543 F.2d 606, 609 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

[10, 11] The Rule of Reason test as enunciated in the landmark case of *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), mandates that a court determine whether the restraint imposed merely regulates and thereby promotes competition or is one that may suppress or destroy competition. In order to do this, the court:

> must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238, 38 S.Ct. at 244.[21] Crucial to proving an antitrust violation under the Rule of Reason is a showing of anticompetitive intent or effect. *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280 (7th Cir. 1982); *Tose v. First*

21. Plaintiffs ask that this court apply the test announced by the court in *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D.Cal. 1971). That court viewed the *Silver* case as an exception to the finding of group boycotts as per se violations for reasonably self-regulated industries. The test requires: (1) that there exists a legislative mandate for self-regulation or otherwise; (2) the group action is intended (a) to reach a result consistent with the policy justifying self-regulation; (b) is reasonably related to that goal; and (c) is no more expansive than necessary; and (3) there are procedural safeguards assuring the restraint is not arbitrary and which provides a basis for judicial review. *Id.* at 1064-65. This test has not been applied by the Third Circuit. Thus I will use instead the traditional Rule of Reason test, this test having been recently reaffirmed by the Third Circuit in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d 1981), *cert. denied*, ____ U.S. ____, 102 Ct 1715, 17 L.Ed.2d 137 (1982)

Pennsylvania Bank, N.A., 648 F.2d 879, 892 & n. 17 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir.1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981). In this regard, the case of *Levin v. National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y.1974) is instructive.

In *Levin*, the plaintiffs were two businessmen who had an agreement to buy the Boston Celtics basketball team. Before this deal could be consummated, it had to be approved by three-fourths of the members of the National Basketball Association ("NBA"), a league comparable to the NFL. The NBA failed to approve the sale.

The reasons for the disapproval were disputed by the parties. Plaintiffs alleged they were rejected only because they were friendly with an obstreperous and disliked member of the NBA. Defendants on the other hand claimed that to permit the transfer would result in a violation of a conflict of interest provision of the NBA constitution. The court decided, however, that the reason for the disapproval was irrelevant because whatever the reason, it was not anticompetitive.

> Here the plaintiffs wanted to *join* with those unwilling to accept them, *not to compete with them*, but to be partners in the operation of a sports league for plaintiffs' profit. Further, no matter which reason one credits for the rejection, it was not an anti-competitive reason. Finally, regardless of the financial impact of this rejection upon plaintiffs, if any, the exclusion of the plaintiffs from membership in the league did not have an anti-competive effect nor an effect upon the public interest.

Id. at 152 (footnote omitted) (emphasis in original). Because defendants' actions were not prompted by any

anticompetitive intent or effect, the court granted summary judgment in defendants' favor. [22]

The reasoning in the *Levin* case is applicable to plaintiffs here. They do not want to compete with the NFL. They tried that and failed. Now they seek to join the asserted antitrust violaters and share all the advantages of an established organization. Plaintiffs try to eschew this obvious conclusion by emphasizing that a franchise's revenue does not come solely from jointly earned profits; some money is earned by individual promotion, for example, of team paraphernalia and from local broadcast revenues. This does not change the obvious fact that the ability to earn these individual profits is an indirect benefit of being a member of the league. A franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty. If the Mid-South Grizzlies played inept teams, their revenue generating potential would no doubt drop. Plaintiffs simply are

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22. Two commentators on the law of sports have expressed the following view concerning the awarding of sports franchises:

> The admission practices of sports leagues present a different concern. An analysis of the relationship between clubs within a league suggests that the various league members do not compete with one another in an economic sense. Rather, a league is more like a partnership. While each club initially contributes its own capital, the various participants to a large extent share in the joint profits of the venture . This participation in profits is achieved through various arrangements, such as the pooling of television receipts and the division of gate receipts between home and visiting clubs. Thus, a decision on access to membership is basically a decision as to whether particular individuals (or their business entities) will be allowed to participate in the partnership venture. Since the various members pool their efforts and do not engage in economic competition with one another, an adverse decision on membership in the usual case has no appreciable impact on the level of competition which will take place.

J. Weistart & C. Lowell, *The Law of Sports* §3.16, at 315 (1979) (footnotes omitted).

not competitors of defendants who have been injured by any anticompetitive behavior of defendants.

In fact, were plaintiffs to prevail, the receipt of a franchise would be more anticompetitive than their failing to obtain one. Were plaintiffs' premise embraced by this court — that all acceptable applicants for franchises be given one—then motivation to form a rival league would be substantially dampened. *See* J. Weistart & C. Lowell, *The Law of Sports* §5.11, at 751 (1979).

Moreover, defendants acted fairly and objectively in deciding to reject plaintiffs' application. They met with plaintiffs at least three times over the course of four months to hear plaintiffs out and to explain the reasons why neither plaintiffs' nor any other application would be considered on the merits.[23] Rozelle and the Expansion Committee arranged a meeting between plaintiffs and the entire league membership despite their own belief and recommendation that further expansion not be initiated at that time. Plaintiffs' were thus afforded an opportunity to dissuade the membership from following the Committee's recommendation. Furthermore, Rozelle again reiterated the reasons for refusing plaintiff's application in a letter dated December 29, 1975. Exhibit 3B, Motion of Defendants for Summary Judgment and Addenda. There is no evidence that plaintiffs were treated in a manner less favorably than any other party expressing an interest in obtaining a franchise.

The fact defendants failed to fully consider plaintiffs' application on its merits does not suggest a contrary result. Defendants had substantial business reasons to justify their decision not to plan any further expansion at the time of plaintiffs' application. They were in the middle of assimilating the first two new teams in several

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23. In addition Mr. Bassett testified that he met with Mr. Rozelle another three or four times as well as talked with him on the telephone on three or four occasions. Bassett Deposition, January 21, 1981, at 103.

years each of which took three players from each existing team. Moreover, the NFL had several lawsuits against it which were creating a great deal of uncertainty as to the future of several NFL rules and policies. Given these factors, it was a business judgment that further expansion at that time would be foolhardy. Thus, an in depth inquiry into plaintiffs' application would have been a waste of defendants' and plaintiffs' time. To require such busywork for each application which was submitted to the defendants when it was already decided not to expand would simply be bad business.[24] It just does not make sense to pass judgment on a potential franchisee when no franchise is available and it would be equally as foolish to commit a future franchise to an entity which may not even be in existence or otherwise fail to qualify on the date the franchise becomes available.

[12] Recognizing the irrelevance of their game plan plaintiffs try an end run based upon their allegation that the defendants' sole motivation for rejecting them as a franchisee was their past involvement with the WFL. *See* J. Weistart & C. Lowell, *supra* §5.11, at 756-57. Plaintiffs fail, however, to muster any substantial evidence to support this assertion. Even where a state of mind is material in an antitrust case, there must be some demonstration that there is a sufficient quantum of evidence to permit a party to go to the jury. *White v. Hearst Corp.*, 669 F.2d 14, 17 (1st Cir. 1982).

The only evidence to support plaintiffs' allegation comes from the testimony of Mr. Bassett. At his deposition Mr. Bassett stated that some people had expressed the *opinion* that his past WFL affiliation would hurt his

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24. Mr. Rozelle testified that he has received inquiries from twenty to thirty cities about obtaining an NFL franchise since he became Commissioner in 1960. It is not clear how many of these submitted a formal application. Rozelle Deposition, November 12, 1981, at 28.

chances at obtaining an NFL franchise.[25] Some of this is speculation and some is hearsay. This is hardly the kind of play upon which to rely for an antitrust score.[26] Of particular importance, however, is that Bassett admitted these views were personal to the speakers and did not represent the NFL's position. Bassett Deposition, January 21, 1981, at 111-21. Notably, Bassett did not testify that similar statements were voiced by Rozelle[27] or any member of the Expansion Committee, all of whom already had decided further expansion would be unwise and recommended this course to the NFL membership. It is clear that if any mind-set existed, it was against immediate expansion and not against plaintiffs as franchise applicants.

[13] In plaintiffs' next series of downs they concentrate on the essential facility doctrine.[28] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Hecht v. Pro-Football,*

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25. These people are Mr. Lynn, then General Manager of the Minnesota Vikings; Mr. Robbey, the owner of the Miami Dolphins; Mr. Thomas, then General Manager of the Baltimore Colts; and possibly Mr. Finks of the Chicago Bears. In addition, Mr. Keating, an NFL player representative, and Mr. Czonka, a former NFL and WFL player, stated they had heard Mr. Robbey express disfavor of Mr. Bassett's WFL activities. Lastly, a Mr. Mix, a former player and player representive said he had heard similar thoughts expressed by some NFL people. Bassett Deposition, January 21, 1981, at 111-21.

26. Indeed, it seems to me that for this play to have any chance at all it should be made in the context of the Memphis franchise having been awarded to another applicant.

27. In fact, Mr. Bassett testified Mr. Rozelle assured him his WFL past would not be held against him. Bassett Deposition, January 21, 1981, at 116 & 121.

28. The essential facility doctrine applies in the following situation: "[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable non-discriminatory terms." L. Sullivan, *Handbook of the Law of Antitrust* §48, at 131 (1977).

Inc., 570 F.2d 982 (D.C.Cir.1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). Plaintiffs' reliance on this doctrine is misplaced. The doctrine is applicable only where a party is being denied access to something necessary for that party to engage in business which is controlled by his *competitors*. The *Hecht* case is illustrative.

In *Hecht*, plaintiffs were a group of promoters who had tried and failed to obtain an AFL franchise in Washington, D.C.[29] The apparent reason for this failure was the plaintiffs' inability to procure a contract with the only stadium suitable for professional football play due to a clause in the contract the stadium owner had with the NFL franchisee in the area which prohibited the stadium being leased for use by any other professional football team. The *Hecht* court held that the trial court erred in failing to instruct the jury concerning the essential facility doctrine.

[14, 15] In *Hecht* it was clear that a competitor was being denied access to an essential facility by a rival team in a different league. Such is not the case here. As previously stated, plaintiffs wish to join with defendants not compete with them. Nor are the defendants denying the Mid-South Grizzlies access to any stadium. Moreover, it is not economically infeasible for plaintiffs to engage in professional football. *Hecht v. Pro-Football, Inc.*, *supra*, at 992. Although not an easy task, plaintiffs are free to again attempt to form a rival football league.[30]

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29. Plaintiffs' attempt took place prior to the AFL's merger with the NFL in 1966.

30. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982), a manufacturer of bubble gum sued a rival bubble gum manufacturer and the Major League Baseball Players Association claiming the defendants had excluded effective competition in the sale of baseball cards because of their exclusive licensing contracts. The Third Circuit held that these contracts did not foreclose competition in part because Fleer could still compete for

Plaintiffs concede a history of a number of leagues appearing over the years. *See* Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at 4-9. The AFL proved the task of forming a rival league is not impossible. Indeed, a new football league, the United States Football League ("USFL"), is currently being organized and John Bassett, the chief executive officer of the plaintiff Mid-South Grizzlies partnership, is the owner of the Tampa franchise in that league.[31] *See The Philadelphia Inquirer*, May 16, 1982, Section E, at 1.[32]

[16] For similar reasons, plaintiffs' reliance on several trade association cases is also inappropriate. *See, e.g., United States v. Realty Multi-List, Inc.*, 629 F.2d

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NOTE — *(Continued)*

licensing contacts with minor league players which, in time, may become major league players. The fact this process may take several years to become profitable, the court found, did not make the defendants' agreements anticompetitive.

31. Judicial notice may be used in resolving a motion for summary judgment. 10 C. Wright & A. Miller, *Federal Practice and Procedure* §2723 (1973).

32. Even were plaintiffs true competitors with defendants, I have serious doubts the essential facility doctrine would apply. The cases applying the doctrine involved the denial of access to physical structures or discreet services. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (electrical transmission lines); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (direct telephone access to stock exchange for instantaneous communication); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (railroad switching facilities); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978) (football stadium); *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976) (flour mill); *United States v. Standard Oil Co.*, 362 F.Supp. 1331 (N.D.Cal. 1972), *aff'd*, 412 U.S. 924, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973) (fuel storage facilities). In contrast, plaintiffs seek to participate in an entire business organization. Thus, the principles enunciated in these cases seem inapposite.

1351 (5th Cir. 1980). In such cases, the courts have required that the association's membership criteria be fair, reasonable and the least restrictive as possible. The philosophical foundation for this rule is stated in the *Realty* case:

> When a group of competitors like the membership of RML [the trade association] join together to cooperate in the conduct of their business, there naturally arise antitrust suspicions. As Adam Smith, the archangel of the free enterprise system, observed, "People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public. . . ."

Id. at 1370 (citation omitted). Because the potential harm to outsiders is so great when their competitors are brought together through a trade association, the law requires access to the group be available to anyone who meets fair criteria. *Id.* at 1371-72; *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

[17] The evil that this rule is designed to thwart is absent in the case at bar. As stated earlier, the production of professional sports necessarily requires joint planning and decision making. Unlike normal business competitors, the teams are interdependent, *North American Soccer League v. National Football League*, 670 F.2d at 1251, and while the economic success of one team does not necessarily mean the success of another member, the stability which is derived from membership in a league produces a better product which is to the benefit of the public at large. They do not compete in the same manner as the independent businesses in these trade association cases. Thus, these cases are inapposite.

[18] Based upon the undisputed material facts I conclude as a matter of law that a Section 1 violation has not been made out. Thus, plaintiffs are scoreless at halftime.

The Second Half

Finding no Section 1 violation is not the end of the ball game. Plaintiffs also assert that defendants' behavior constitutes an unlawful act of monopolization proscribed by Section 2 of the Sherman Act. This effort also fails to penetrate the NFL's defensive line.

[19-21] There is no doubt that the NFL currently has a monopoly in the United States in major league football.[33] However, the possession of monopoly power in a relevant market alone is not enough to establish an antitrust violation. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). The antitrust laws were not intended to punish a business that has become a monopoly because of a "superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).[34] The law does require that a monopoly not abuse its power. Thus where a business possessing monopoly power willfully acquires or maintains such power, it will incur a penalty. *Id.* To avoid a Section 2 violation, then, a monopoly must "refrain at all times from conduct directed at smothering competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 275. Put another way, a monopoly abuses its power when it behaves in an "unreasonably exclusion-

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33. Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), found a 90% share of a relevant market conclusive evidence of monopoly power. Plaintiffs allege that the relevant product market is major league professional football; the relevant geographic market is the United States, with a submarket in the "Mid-South" area comprised of Tennessee, Mississippi and Arkansas. Defendants do not dispute these contentions and I find them to be acceptable.

34. Judge Hand phrased it in this manner: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America*, 148 F.2d at 430.

ary manner vis-a-vis rivals or potential rivals. . . ." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 (6th Cir. 1979); *Borden, Inc. v. Federal Trade Commission*, 674 F.2d 498, 513 (6th Cir. 1982).

[22] Once again plaintiffs fail to get the necessary yardage. Plaintiffs simply are not rivals or potential rivals of defendants except on the playing field. Moreover, despite plaintiffs' failure to obtain a franchise, they are still free to promote a rival league. The actions plaintiffs complain of here have done nothing to prevent the formation of a rival league or the fielding of a team in Memphis, Tennessee. Thus, no Section 2 violation has been shown as a matter of law. Plaintiffs fail to score again and the time has run out on the clock. Defendants win.

Post Game Analysis

I do not hold that the NFL and its members cannot be guilty of anticompetitive behavior but only that the denial upon demand of a new National Football League franchise to a qualified person does not run afoul of the antitrust laws.

Defendants are entitled to summary judgment on plaintiffs' claims under both Sections 1 and 2 of the Sherman Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MID-SOUTH GRIZZLIES, et al :
:
Civil Action
v. :
:
No. 79-4373
NATIONAL FOOTBALL LEAGUE, et al :

MEMORANDUM ORDER

This is an antitrust action against the National Football League ("NFL") and its composite members. Plaintiffs are individuals who were active in the formation of the World Football League ("WFL"), a competitor of the NFL. The WFL terminated operations on October 22, 1975.

The complaint alleges that plaintiffs organized a professional football team named the Mid-South Grizzlies; that on November 18, 1975 they applied for a NFL franchise for Memphis, Tennessee, a city that the NFL had previously designated as capable of financially sustaining a franchise; and that they satisfied all of the criteria for membership of the NFL. In Count One of the two-count complaint, plaintiffs allege that the defendants never considered the merits of their application for a franchise but rather, in retaliation for their participation in the WFL, have boycotted and collectively refused to deal with them. Plaintiffs contend that this conduct violates Section 1 of the Sherman Act, 15 U.S.C. §1.

Count Two of the complaint alleges a violation of Section 2 of the Sherman Act, 15 U.S.C. §2. Specifically, it is contended that since the Fall of 1975, defendants have combined and conspired "to maintain complete control over major league professional football activities

in the United States, to eliminate all competitors and potential competitors and to punish, intimidate and restrain plaintiffs and all other participants in the WFL from participation in major league professional football." Complaint ¶59.

Defendants have filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. Among the documents submitted in support of the motion are the affidavits of Pete Rozelle, Commissioner of the NFL and Daniel M. Rooney, Chairman of the Expansion Committee of the NFL. In their affidavits, these officials give a variety of reasons for the NFL's refusal to grant the plaintiffs' application for admission to the NFL.

Plaintiffs vigorously argue, however, that the granting of a motion for summary judgment at this time would be premature because they have not had the opportunity to conduct discovery in order to test the accuracy of the Rozelle and Rooney affidavits. Defendants have resisted plaintiffs requests for voluminous documents and answers to numerous interrogatories, claiming that they are unnecessary and unreasonable and that compliance would be unduly burdensome. A district court has discretion to protect a party from answering interroratories or producing documents if it would prove unduly burdensome or unreasonable. Fed.R.Civ.P. 26(c); *Bowman v. General Motors Corp.*, 64 F.R.D. 62, 68 n.6 (E.D.Pa. 1974).

I agree that plaintiffs should have the opportunity to test the sufficiency of these affidavits, see *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977), but this does not mean that they are entitled to embark on a "fishing expedition" through defendants' records or to harass them with countless interrogatories. Accordingly, to protect the defendants but at the same time to permit the plaintiffs an opportunity to obtain adequate discov-

ery to support their claim, it is hereby ORDERED, pursuant to Fed.R.Civ.P. 26(c) and Local Rule 21, that:

1. Plaintiffs and defendants complete all their discovery before 5:00 p.m. on October 31, 1981.

2. Plaintiffs limit their requests for production of documents and interrogatories solely to matters relating to the NFL's decision not to grant the plaintiffs a NFL franchise at Memphis, Tennessee and to the NFL's prior practices and standards with respect to the admission of new franchise into the league since the merger of the NFL and the American Football League.

3. Plaintiffs' depositions of defendants be limited to Pete Rozelle, Daniel M. Rooney and other members of the NFL Expansion Committee and their inquiry be limited solely to matters relating to the NFL's decision to deny plaintiffs' application for a franchise at Memphis, Tennessee and the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and the American Football League.

After completion of discovery on October 31, 1981, defendants may renew their motion for summary judgment and supplement it with any materials made pertinent by Rule 56, but must do so by 5:00 p.m. on November 16, 1981.

5. Plaintiffs must file their opposition to defendants' renewal of their motion with all materials pertinent thereto no later than 5:00 p.m. on November 30, 1981.

6. If they so desire, defendants may file a reply brief to plaintiffs' opposition no later than 5:00 p.m. on December 8, 1981.

7. If they so desire, plaintiffs may file a counter-reply to defendants' reply no later than 5:00 p.m. on December 15, 1981.

BY THE COURT:

JOSEPH L. McGLYNN, JR., *J*

Date: 8/13/81

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;* GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 7, 1984.
Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge;* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 23, 1983

Steve Alexander, Esquire
Sprague & Rubenstone
Suite 400, Wellington Bldg.
135 S. 19th Street
Phila., PA 19103

Re: The Mid-South Grizzlies, etc., Appellants vs.
The National Football League, etc.

No. 82-1793

Dear Counsel:

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to January 4, 1984, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

Sally Mrvos, *Clerk*

By _____
Deputy Clerk

CH
enc.
cc: Gary Green, Esquire
Morris L. Weisberg, Esquire
(James C. McKay, Esquire
(Constance J. Chatwood, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

The Mid-South Grizzlies, etc., et. al., Appellants
v.
The National Football League, etc., et. al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 4, 1984.

Circuit Judge

Dated: Dec. 23, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 9, 1984

Steven Alexander, Esquire
Sprague & Rubenstone
Suite 400, Wellington Bldg.
135 S. 19th St.
Phila., PA 19103

Re: The Mid-South Grizzlies, etc., et al., Appellants
vs. The National Football League, etc., et. al.

No. 82-1793

Dear Mr. Allexander: /further

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to February 3, 1984, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

Sally Mrvos, *Clerk*

By: _____
Betty J. Robinson
Deputy Clerk

sa

cc: Gary Green, Esquire
Morris L. Weisberg, Esquire.
(James C. McKay, Esquire
(Constance J. Chatwood, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

The Mid-South Grizzlies, etc., et. al., Appellants
v.
The National Football League, etc., et. al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until February 3, 1984.

Circuit Judge

Dated: Jan. 9, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.82-1793

THE MID-SOUTH GRIZZLIES, etc., et al.,
Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, etc., et al.

(D. C. Civil No. 79-4373)

It appearing that a panel of this Court filed an Opinion and entered a Judgment on November 4, 1983, and it further appearing that appellants filed a timely petition for rehearing on November 18, 1983 which petition was denied on December 5, 1983, and it further appearing that the mandate was stayed to and including February 3, 1984 and it further appearing that appellants filed a motion on February 2, 1984 for a further stay of the mandate to and including March 5, 1984, and it further appearing that the Clerk's office erroneously issued the certified judgment in lieu of formal mandate on February 7, 1984, while the motion was still pending before the Court, all in the above-entitled case,

It is ORDERED that the certified judgment issued February 7,1984, be and hereby is recalled.

For the Court,

Chief Deputy Clerk

Dated: February 8, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General

Partnership; ST. LOUIS FOOTBALL CARDINALS COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;*
GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 7, 1984.
Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES, etc., et al.,
Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, etc., et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until March 5, 1984.

s/ JOHN J. GIBBONS

Circuit Judge

Dated: February 13, 1984

NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT
U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
U.S. TAX COURT

THE MID-SOUTH GRIZZLIES (A Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (A Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.	Circuit Court Docket Number 82-1793
v.	District or Tax Court
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.	Docket No. CA No. 79-4373JLM
	District or Tax Court
	Judge Hon. Joseph L. McGlynn, Jr.

BALTIMORE FOOTBALL CLUB, INC.;
BUFFALO BILLS, INC.;
CHARGERS FOOTBALL COMPANY;
CHICAGO BEARS FOOTBALL CLUB, INC.;
CINCINNATI BENGALS, INC.;
CLEVELAND BROWNS, INC.;
DALLAS COWBOYS FOOTBALL CLUB, INC.;
DETROIT LIONS, INC.;
FIVE SMITHS, INC.;
GREEN BAY PACKERS, INC.;
HOUSTON OILERS, INC.;
KANSAS CITY CHIEFS FOOTBALL CLUB, INC.;
LOS ANGELES RAMS FOOTBALL COMPANY;

MIAMI DOLPHINS, LTD.;	:
MINNESOTA VIKINGS FOOTBALL CLUB, INC.;	:
NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.;	
NEW YORK FOOTBALL GIANTS, INC.;	:
NEW YORK JETS FOOTBALL CLUB, INC.;	:
NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP;	:
OAKLAND RAIDERS, LTD.;	:
PHILADELPHIA EAGLES FOOTBALL CLUB, INC.;	:
PITTSBURGH STEELERS SPORTS, INC.;	:
PRO-FOOTBALL, INC.;	:
ROCKY MOUNTAIN EMPIRE SPORTS, INC.;	:
SAN FRANCISCO FORTY NINERS;	:
SEATTLE PROFESSIONAL FOOTBALL,	:
A General Partnership;	:
ST. LOUIS FOOTBALL CARDINALS COMPANY;	:
TAMPA BAY AREA NFL FOOTBALL, INC.;	:
and PETE ROZELLE,	: CIVIL ACTION
Defendants	: No. 79-4373JLM

Notice is hereby given that The Mid-South Grizzlies, et al., plaintiffs appeals to the United States Court of Appeals for the Third Circuit from ( ) Judgment (X) Order ( ) Other (Specify) Order and Memorandum of Decision granting defendants' motion for summary judgment.
entered in this action on November 5, 1982.

Dated:

Counsel for Appellant — Signature

Steven Alexander, *Esquire*

Name of Counsel—Typed

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;*
GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

15 U.S.C.

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(Oct. 15, 1914, c. 323, §4, 38 Stat. 731.)

15 U.S.C.

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved,

between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.)

§1291. Exemption from antitrust laws of agreements covering telecasting of sports contests and combining of professional football leagues

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the

rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of Title 26, combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

(Pub.L. 87-331, §1, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(1), Nov. 8, 1966, 80 Stat. 1515.)

§1292. Area telecasting restriction limitation

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

(Pub.L. 87-331, §2, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(2), Nov. 8, 1966, 80 Stat. 1515.)

§1293. Intercollegiate and interscholastic football contest limitations

The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a date if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

(Pub.L. 87-331, §3, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(3), Nov. 8, 1966, 80 Stat. 1515).

§1294. Antitrust laws unaffected as regards to other activities of professional sports contests

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

(Pub.L. 87-331, §4, Sept. 30, 1961, 75 Stat. 732.)

§1295. "Persons" defined

As used in this chapter, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

(Pub.L. 87-331, §5, Sept. 30, 1961, 75 Stat. 732.)

Fed.R.Civ.P.

Rule 56. Summary Judgment

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(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgments or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,	:	CIVIL ACTION NO. 79-4373
Plaintiffs,	:	
v.	:	
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.;	:	

NEW YORK FOOTBALL GIANTS, INC.;	:	
NEW YORK JETS FOOTBALL CLUB, INC.;	:	
NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP;	:	
OAKLAND RAIDERS, LTD.;	:	
PHILADELPHIA EAGLES FOOTBALL CLUB, INC.;	:	
PITTSBURGH STEELERS SPORTS, INC.;	:	
PRO-FOOTBALL, INC.;	:	
ROCKY MOUNTAIN EMPIRE SPORTS, INC.;	:	
SAN FRANCISCO FORTY NINERS;	:	
SEATTLE PROFESSIONAL FOOTBALL, A General Partnership;	:	
ST. LOUIS FOOTBALL CARDINALS COMPANY;	:	
TAMPA BAY AREA NFL FOOTBALL, INC.;	:	
and PETE ROZELLE,	:	JURY TRIAL
Defendants.	:	DEMANDED

COMPLAINT

The above-named plaintiffs, by and through their counsel, Sprague, Goldberg & Rubenstone, file this Complaint against the above-named defendants and state as follows:

COUNT I.

A.

JURISDICTION AND VENUE

1. This action is brought to secure treble damages from each defendant pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) for defendants' violations of Sec-

tion 1 of the Sherman Act (15 U.S.C. §1), as hereinafter alleged.

2. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1337.

3. Each defendant transacts business in and is found, has an agent or resides within the Eastern District of Pennsylvania or has carried on the unlawful activities herein alleged, in part, in the Eastern District of Pennsylvania. The interstate commerce activities described below are carried on, in part, in the Eastern District of Pennsylvania.

B.

PARTIES

4. Plaintiff Mid-South Grizzlies is a Joint Venture (herein "Joint Venture") established on November 1, 1975 and consisting of the following joint venturers: Mid-South Grizzlies, a Tennessee limited partnership, John Edward Bosacco, a citizen and resident of the Commonwealth of Pennsylvania, and Consolidated Industries, Inc., a California corporation.

5. Plaintiff John Edward Bosacco ("Bosacco") is a citizen and resident of the Commonwealth of Pennsylvania and resides at 344 W. Front Street, Media, Pennsylvania.

6. Plaintiff Mid-South Grizzlies is a Tennessee limited partnership. The general partner of Mid-South Grizzlies is Toronto Football, a limited partnership. The Chief Executive officer of Mid-South Grizzlies is John F. Bassett.

7. Plaintiff Consolidated Industries, Inc., is a California corporation, having its principal place of business at 1377 W. Shaw Avenue, Fresno, California. It is solely owned and controlled by William R. Tatham.

8. Defendant National Football League (hereinafter referred to as "NFL") is an unincorporated association with its headquarters at 410 Park Avenue, New

York, New York. Defendant NFL was organized for the purpose of engaging in the business of major league professional football. Defendant NFL is made up of and is operated by its member-professional football teams located in several cities throughout the United States, as identified in paragraph 10 of this Complaint, including defendant Philadelphia Eagles Football Club, Inc., which is located in the Eastern District of Pennsylvania and which plays professional football games on a regular basis with other defendant member-clubs in the Eastern District of Pennsylvania. Defendant NFL is found, has an agent in and transacts business in the Eastern District of Pennsylvania.

9. Defendant Pete Rozelle ("Rozelle") is an individual and is the Commissioner of the defendant NFL, with his office at 410 Park Avenue, New York, New York. Defendant Rozelle is found, has an agent in or transacts business in the Eastern District of Pennsylvania.

10. The remaining twenty-eight defendants abovenamed are members of the defendant NFL, were members of defendant NFL at the time of the illegal acts complained of in this Complaint, and operate major league professional football teams in their respective cities and in each other city in which defendants member-clubs are located pursuant to a schedule fixed by the defendants NFL and Rozelle. They are:

	PRINCIPAL PLACE OF BUSINESS
Baltimore Football Club, Inc. (Baltimore Colts)	11000 Bonita Avenue Ellings Mill, Maryland
Buffalo Bills, Inc.	1 Bills Drive Orchard Park, New York
Chargers Football Company (San Diego Chargers)	San Diego Stadium 9449 Friars Road San Diego, California
Chicago Bears Football Club, Inc.	533 E. Jackson Street Chicago, Illinois
Cincinnati Bengals, Inc.	200 Riverfront Stadium Cincinnati, Ohio

Cleveland Browns, Inc.	Cleveland Stadium Cleveland, Ohio
Dallas Cowboys Football Club, Inc.	Expressway Tower Building 6116 N. Central Expressway Dallas, Texas
Detroit Lions, Inc.	1200 Featherstone Street Pontiac, Michigan
Five Smiths, Inc. (Atlanta Falcons)	317 I-85 Buford, Georgia
Green Bay Packers, Inc.	1265 Lombardi Avenue Green Bay, Wisconsin
Houston Oilers, Inc.	6910 Fannon Street Houston, Texas
Kansas City Chiefs Football Club, Inc.	1 Arrowhead Drive Arrowhead Stadium Kansas City, Missouri
Los Angeles Rams Football Company	10271 W. Pico Blvd. Los Angeles, California
Miami Dolphins, Ltd.	330 Biscayne Blvd. Miami, Florida
Minnesota Vikings Football Club, Inc.	7110 France Avenue Edina, Minnesota
New England Patriots Football Club, Inc.	Schaefer Stadium Foxboro, Massachusetts
New York Football Giants, Inc.	Giant Stadium East Rutherford, New Jersey
New York Jets Football Club, Inc.	598 Madison Avenue New York, New York
New Orleans Saints Louisiana Partnership	1500 Poygras Street New Orleans, Louisiana
Oakland Raiders, Ltd.	7811 Oak Port Street Oakland, California
Philadelphia Eagles Football Club, Inc.	Veterans Stadium Broad and Pattison Avenues Philadelphia, Pennsylvania
Pittsburgh Steelers Sports, Inc.	Three River Stadium 300 Stadium Circle Pittsburgh, Pennsylvania
Pro-Football, Inc. (Washington Redskins)	J.F.K. Stadium Washington, D.C.
Rocky Mountain Empire Sports, Inc. (Denver Broncos)	5700 Logan Street Denver, Colorado
San Francisco Forty Niners	1255 Post Street Suite 300 San Francisco, California

Seattle Professional Football (Seattle Seahawks)	5305 Lake Washington Blvd., N.E. Kirkland, Washington
St. Louis Football Cardinals Company	200 Stadium Plaza St. Louis, Missouri
Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers)	1 Buccaneer Place Tampa, Florida

11. Each of the foregoing defendants is found in, has an agent in, resides or transacts business within the Eastern District of Pennsylvania.

C.

CO-CONSPIRATORS

12. Various other persons, firms entities and corporations, not named or made defendants herein, have participated as co-conspirators with defendants in the offenses charged in this Complaint, have performed acts declared illegal by the Sherman Act and have acted in furtherance of the unlawful conspiracy, in unreasonable restraint of trade, group boycott, monopolization, attempted monopolization and conspiracy to monopolize, as is hereinafter alleged.

D.

INTERSTATE COMMERCE

13. The conduct of the defendants and co-conspirators constitute, involve and affect commerce among the several states including, *inter alia*, the nationwide presentation of televised games, the purchase of substantial quantities of equipment and supplies across state lines, the sale of admission tickets to professional football games across state lines, the convening of meetings of NFL members who travel across state lines to attend such meetings, the transportation of players, coaches and personnel across state lines for the presentation of games, the promotion of professional football and the in-

terstate advertising of professional football events within the scope and jurisdiction of §1 of the Sherman Act, 15 U.S.C. §1.

E.

BACKGROUND OF THE INDUSTRY

14. Major league professional football is a major spectator sport throughout the United States conducted by and through teams of players to provide the general public with highly skilled exhibitions of the game of football.

15. Each major league professional football team in existence in the United States is a member of the defendant NFL. The NFL,as it is presently constituted, is the product of a merger between the NFL and the American Football League in 1966. There is no other major professional football league presently operating or in existence in the United States.

16. The defendant NFL, with and through each of its member-defendants herein, operates and promotes the holding of major league professional football games, including regularly scheduled, playoff and championship games, and, in addition, performs various administrative and promotional functions, including, but not limited to, organizing and scheduling such games, providing officials for supervision of such games, establishing rules for such games and for the recruitment of players and player contracts, negotiating the sale of and rights to broadcast and rebroadcast such games over radio and television facilities, providing for the sale of various subsidiary promotional rights, establishing rules for the admission of new members and transfer of member-clubs, and exercising overall supervision over the activities of major league professional football.

17. The NFL performs its functions pursuant to a Constitution and By-Laws, and by and through defendant Rozelle and various committees and subcommittees,

comprised of the defendants member-clubs and their representatives.

18. Each member-club defendant of the defendant NFL has paid a franchise fee to the NFL in order to conduct and operate a major league professional football team. The proceeds of the franchise fees are distributed among the then existing member-clubs of the NFL. Each member-club is regularly assessed certain dues and fees to cover the expenses incurred by the defendant NFL in the operation and administration of the NFL and its various activities.

19. New franchises in the NFL are granted by the defendant NFL and the defendant member-clubs. At the time of the events complained of in this Complaint, a new franchise was granted by the NFL only upon the consent of 75% of the then existing member-clubs in the NFL, or twenty of the then-existing member-clubs of the NFL, whichever amount is greater.

20. The World Football League ("WFL") was organized in 1973 and operated in 1974 and through October, 1975. During this period, the WFL competed with the defendant NFL for both professional football players, spectators and various other promotional and sales markets. The WFL was comprised of 12 professional football teams in 1974 and 11 professional football teams in 1975.

21. Plaintiff Bosacco owned and operated the "Philadelphia Bell," a member team in the WFL.

22. Plaintiff Mid-South Grizzlies, a limited partnership, owned and operated the "Memphis Southmen," also known as the "Memphis Grizzlies," a member team in the WFL.

23. Plaintiff Consolidated Industries, Inc. owned and operated the "Portland Storm," a member team in the WFL.

24. Since the WFL ceased its operations in 1975, the NFL has had a complete monopoly over major league professional football in the United States.

F.

RELEVANT MARKET

25. The relevant product/service market is major league professional football. The relevant geographic area is the United States. A relevant geographic submarket is the Memphis, Tennessee and the Mid-South area, comprised of the states of Tennessee, Mississippi and Arkansas. More than six million people live in this area. The Mid-South area has no representation in the NFL.

26. Major league professional football constitutes a market which is separate and distinct from the exhibition of minor league or other professional, semi-professional, collegiate or high school football contests or other sporting activities, forms of public shows, spectacles and entertainment events. It is the only class of professional football which attracts widespread public interest, which is regularly publicized in newspapers and magazines and which attracts network television and radio sponsorship.

27. Defendant NFL is and the defendant member-clubs constitute the only national, major, professional football league in the United States, and have a complete and absolute monopoly in the relevant product and geographic markets.

G.

VIOLATIONS ALLEGED

28. This Count is brought pursuant to §1 of the Sherman Act, 15 U.S.C. §1. Plaintiff herein incorporates and reallege paragraphs 1 through 27 of this Complaint, as if fully set forth herein.

29. The defendants and their co-conspirators have entered into and engaged in unlawful acts, combinations, conspiracies, contracts, conduct, concerts of action, practices, agreements understandings and de-

vices, as is more specifically set forth in the following paragraphs of this Complaint, to effectuate the following purposes.

(a) To boycott and collectively refuse to deal with plaintiff in and from the business of major league professional football in the United States;

(b) To retaliate against plaintiffs for their prior activities in organizing and participating in a competing major professional football league, and to intimidate, as a result, all persons who may desire to compete with defendants through the establishment of competing leagues;

(c) To discriminate arbitrarily against plaintiffs as to their application for membership in defendant NFL without regard to the objective qualifications of plaintiffs and to give preference to certain other applicants solely on the basis of personal affiliations;

(d) To deny plaintiffs' access to a jointly-owned and operated "bottleneck" facility, to wit: the only national, major professional football league in the United States, without employment of any objective and formulated criteria for admission to such entity or of any semblance of procedural standards against which plaintiffs' qualifications for membership could be compared;

(e) To reserve the territorial area known as the "Mid-South" region of the United States for the purpose of future expansion by one or more of the defendants themselves or by other persons having personal or financial affiliations with the defendants, without regard to the plaintiffs' qualifications for and right to engage in major league professional football in the "Mid-South" territory; and

(f) To maintain defendants' complete control over major league professional football activities in the United States.

30. On November 1, 1975, plaintiffs Bosacco, Mid-South Grizzlies and Consolidated Industries, Inc. entered into a Joint Venture Agreement ("Agreement"). The purpose of the Agreement was to organize a major league professional football organization to be known as the "Memphis Grizzlies," to apply to the NFL for, and to subsequently obtain, membership in the NFL, and to enable plaintiffs to continue their involvement and participation in major league professional football.

31. Plaintiff Mid-South Grizzlies, pursuant to the Agreement, was designated "managing partner" of the Joint Venture.

32. Plaintiffs were ready, willing and able to compete in the NFL, the only professional football major league in existence. Plaintiffs prepared completely for competing in the NFL for the 1976 season by accomplishing the following:

(a) Pursuant to the terms of the Agreement, plaintiffs each made capital contributions to the Joint Venture in sums in excess of $150,000.00, and agreed to contribute, as required and on a pro-rata basis, such additional sums as would be necessary to enable the Joint Venture to meet all of its current and future obligations and financial requirements as an NFL member.

(b) Upon execution of the Agreement, the plaintiffs organized a complete major league professional football organization.

(c) As components of that major league professional organization, the Joint Venture signed thirty-one (31) major league professional football players to contracts, all of whom were highly-skilled and capable employees.

(d) Included among those players were two NFL All-Pros, eight other NFL veterans, five other Canadian Football League veterans and sixteen WFL veterans.

(e) As an additional component of that organization, the Joint Venture signed a seven man, veteran coaching staff to contracts. The Head Coach was the only professional football coach in the United States to amass seventeen regular season victories in 1974 and was, from 1976 to 1978, the Head Coach of defendant New York Giants, and is presently Director of Player Personnel of defendant San Francisco Forty Niners.

(f) President of the Joint Venture was John Bassett. Bassett was former president of the World Football League Memphis Southmen, former President of the Executive Committee of the WFL and a former director of the Toronto Argonaut professional football team of the Canadian Football League.

(g) Executive Vice-President and General Manager of the Joint Venture was Michael Storen. Storen was former Commissioner of the American Basketball Association and founder of the Indiana Pacers professional basketball team, presently a member team in the National Basketball Association.

(h) On October 28, 1975, the City Council of Memphis, Tennessee adopted a formal resolution calling for the expansion of the Memphis Memorial Stadium from 50,000 to 72,000 seats for the express purpose, *inter alia*, of providing larger facilities for an NFL franchise to be awarded to the plaintiffs.

(i) On October 28, 1975, the Joint Venture received the written support of the Memphis Area

Chamber of Commerce, said entity specifically pledging its "full resources" and "maximum staff support" to plaintiffs' application for membership in defendant NFL.

(j) On November 6, 1975, the Joint Venture entered into a lease with the City of Memphis, Tennessee for the use of Memphis Memorial Stadium. Memphis Memorial Stadium compares favorably with the great majority of current NFL stadiums. The lease was to run for ten years (five years plus an option for five years), commencing with the start of the 1976 NFL season.

(k) On November 12, 1975, the Joint Venture received the written support of the Mayor of Memphis, on behalf of himself and the municipality of Memphis, Tennessee, for plaintiffs' application for membership in defendant NFL.

(l) During 1975, the Joint Venture sold in excess of 46,000 season tickets for the 1976 season, plus a firm commitment for all remaining seats. Thus, the Joint Venture achieved a complete sellout for all seats in the stadium for the 1976 season.

33. Beginning in the Fall of 1975, or at some other date presently unknown to plaintiffs, the defendants conspired, combined and contracted among themselves and with their co-conspirators to boycott plaintiffs and to refuse to accept or consider plaintiffs' application for membership in the NFL.

34. On or about October 23, 1975, plaintiffs publicly announced their intention to file an application for membership in the NFL.

35. On November 3, 1975, counsel for the Joint Venture notified defendant Rozelle, by letter of the same date, of plaintiffs' intention to submit a formal application for membership in the NFL for the 1976 season.

36. On November 17, 1975, the Joint Venture filed an application for membership ("application") in the NFL in conformity with the Constitution and By-Laws of the NFL.

37. In accordance with the rules of the NFL, the Joint Venture submitted, with its application, a certified check payable to the NFL in the amount of $25,000.

38. In further accordance with the rules of the NFL, the Joint Venture annexed to the application complete documentation demonstrating full compliance by the plaintiffs with all of the rules of the NFL concerning application for membership, including, *inter alia*, documentation of all steps taken by the Joint Venture and plaintiffs to compete in the NFL.

39. On December 17, 1975, plaintiffs, plaintiffs' Executive Vice-President Mike Storen, and two of plaintiffs' attorneys met with the NFL expansion committee. At that meeting, the expansion committee informed plaintiffs that it had not and would not review plaintiffs' application for membership on the merits, that it was not prepared to discuss the application itself and that it would recommend to the defendant NFL and the defendant NFL member-clubs that plaintiffs' application:

(a) not be considered on its merits; and

(b) be rejected by defendants.

40. Upon information and belief, it is averred that sometime shortly after December 19, 1975, the NFL Expansion Committee recommended to the defendant NFL and the defendant NFL member-clubs that plaintiffs' application not be considered on its merits, that the application be rejected and that no expansion by the NFL take place.

41. Despite the fact that plaintiffs' written application for membership in the NFL was for 1976, plaintiffs repeatedly advised the defendants, including defendant Rozelle, that they would be willing to accept a franchise

in the NFL for 1977, and that they would take whatever steps were necessary to maintain their organization so that it could commence operations in 1977.

42. In January, 1976, at a meeting of defendants in New York, New York, plaintiffs met with defendants and their co-conspirators, presented their application, requested consideration and approval of that application and, among other matters, informed them of plaintiffs' willingness to accept a year other than 1976 for admission to the NFL.

43. At a meeting with defendants on or about March 17, 1976 in San Diego, California, plaintiffs specifically informed defendants that plaintiffs would accept whatever additional terms defendants desired in order to obtain membership in the NFL.

44. On or about March 17, 1976, plaintiffs met with the defendant NFL's Executive Committee to make an additional presentation of their application and, among other matters, informed defendants that the defendants could consider plaintiffs' application amended to the effect that plaintiffs would accept a franchise for whatever year desired by defendants.

45. On or about March 17, 1976, defendants met and formally voted to reject plaintiffs' application. On or about March 17, 1976, defendant Rozelle publicly announced that the NFL had rejected plaintiffs' application.

46. Said refusal was pursuant to an agreement, understanding and conspiracy entered into by and among the NFL member-club defendants, the NFL, Rozelle and their co-conspirators. No consideration was given to the merits of plaintiffs' application or to the possibility and feasibility of granting to plaintiffs a franchise in the NFL, and no basis for the rejection of plaintiffs' application was articulated or formulated by defendants.

47. The NFL would have had no difficulty in designing and implementing a schedule for the 1976 football season to include a Memphis franchise, since plain-

tiffs' formal application was filed nine months prior to the start of the 1976 season and well before the 1976 NFL schedule was set up. Further, informal notice of the filing of the application had been given to the NFL by plaintiffs a full 10 months prior to the start of the 1976 football season.

48. The plaintiffs' application presented no other legitimate difficulties to defendants.

49. In late 1974, defendants awarded expansion franchises for Tampa, Florida, and Seattle, Washington. Said franchises were to begin participation in the NFL in 1976.

50. Plaintiffs' application, including the documentation attached to that application, demonstrated that they were more qualified than the Tampa and Seattle applicants for membership in the NFL.

51. Memphis is a highly desirable submarket for major league professional football, and has been considered as such by the defendant NFL for many years, both prior and subsequent to 1975.

52. The Tampa and Seattle applicants had no former ties with the WFL.

53. Plaintiffs are all former owners of WFL football teams and, as such, were competitors of the defendants. All of the thirty-one football players under contract to the Memphis Grizzlies were former NFL, WFL and Canadian Football League professional football players, and, of those players, twelve were subsequently signed by defendant NFL member-clubs and played professional football in the NFL, and, in addition, six of those players were subsequently signed by Canadian Football League teams and played professional football in the Canadian Football League.

54. The boycott and/or unreasonable restraint of trade among the defendants and their co-conspirators resulted from an agreement, understanding and concert of action among them to concertedly boycott plaintiffs

and to refuse to consider and approve plaintiffs' application for membership in the NFL.

55. The concerted actions of the defendants had the purpose and effect of subjecting plaintiffs to a group boycott, as is more specifically set forth in paragraphs 62 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and, therefore, constitute a *per se* violation of §1 of the Sherman Act, 15 U.S.C. §1. The concerted activities of the defendants constitute an unreasonable restraint of trade and, thereby, violate §1 of the Sherman Act, 15 U.S.C. §1, because they have had and will have the effect of restraining free and open competition in the major league professional football market.

56. The defendants' violations of §1 of the Sherman Act, as more specifically set forth in paragraphs 1 through 54 of this Complaint, have severely damaged plaintiffs in their business and property, as is more specifically set forth in paragraphs 65 through 67 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and were directly aimed at excluding plaintiffs from participation in the only major professional football league in existence in the United States and were intended to punish, intimidate and restrain plaintiffs from such participation in light of plaintiffs' prior involvement with the WFL.

COUNT II

57. This Count is brought pursuant to §2 of the Sherman Act, 15 U.S.C. §2, for unlawful attempt and combinations and conspiracy to monopolize interstate trade and commerce in major league professional football throughout the United States. Plaintiffs herein incorporate and reallege paragraphs 1 through 56 of this Complaint, as if fully set forth herein.

58. Defendants and their co-conspirators control trade and commerce in and related to major league professional football in the United States.

59. Beginning at least as early as the Fall of 1975 and continuing up to the present, defendants have engaged in a combination and conspiracy, consisting of a continuing agreement, understanding and concert of action among defendants and their co-conspirators, to maintain complete control over major league professional football activities in the United States, to eliminate all competitors and potential competitors and to punish, intimidate and restrain plaintiffs and all other participants in the WFL from participation in major league professional football.

60. The concerted actions of defendants had the purpose and effect, as is more specifically set forth in paragraphs 62 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, of excluding plaintiffs from participation in major league professional football in the United States and of establishing defendants' monopoly over interstate trade and commerce in major league professional football activities, and were and are intended, *inter alia*, to punish and intimidate plaintiffs for their participation in the WFL. The ultimate aim of the concerted action and conspiracy to monopolize was and is to eliminate plaintiffs' ability to compete in the major league professional football market and to maintain for defendants complete control over and a monopoly position in the entire market of major league professional football in the United States.

61. Defendants' violation of §2 of the Sherman Act, as is more specifically set forth in paragraphs 1 through 60 of this Complaint, has severely damaged plaintiffs in their business and property, as is specifically set forth in paragraphs 65 through 67 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and was directly aimed at punishing and

intimidating plaintiffs and others as a result of their prior participation in the WFL and was designed to maintain for defendants their complete control over and monopoly position in major league professional football in the United States.

PURPOSES AND EFFECTS OF VIOLATIONS ALLEGED IN COUNTS I AND II

62. As is specifically set forth in paragraphs 1 through 61 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, the aforesaid acts, combinations, conspiracies, practices, contracts, conduct, concerts of action, practices and devices of defendants had numerous purposes and effects, including, *inter alia*, the following:

(a) Trade and commerce within the major league professional football market was and continues to be unreasonably restrained;

(b) Patrons, sponsors, national and local television and radio networks, municipalities and numerous other persons with interests in major legaue professional football were and continue to be deprived of the benefits of free and open competition in the major league professional football market;

(c) The freedom and ability of plaintiffs to participate in major league professional football and to freely bargain to conduct such activities has been and continues to be unreasonably restrained; and

(d) Professional football players, including, but not limited to, those players who were under contract to plaintiffs, who wish to participate in major league professional football and to freely bargain for their services have been denied such rights and have been and continue to be unreasonably restrained in their professional activities.

63. Furthermore, in effectuating said conspiracy and in carrying out the aforesaid illegal activities, defendants intended to and did commit numerous unlawful acts, including, *inter alia,* the following:

(a) The punishment, intimidation and restraint of businessmen, including plaintiffs, who found and/or participated in the activities of the WFL and who posed an economic and competitive threat to the professional football activities of defendants; and

(b) The punishment, intimidation and restraint of NFL players who had left their employment with the defendant NFL and various defendant member-clubs to play professional football in the WFL.

64. Defendants and their co-conspirators have achieved a monopoly in the major league professional football market in the United States as a result of the acts, conducts, combinations and conspiracies as aforesaid.

DAMAGES INCURRED AS A RESULT OF THE VIOLATIONS ALLEGED IN COUNTS I AND II

65. As a result of defendants' violations of §§1 and 2 of the Sherman Act, as set forth in paragraphs 1 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, plaintiffs have suffered and continue to suffer severe and unreasonable damages due to their inability to participate in mjor league professional football in the United States.

66. Because of the unlawful acts of the defendants, plaintiffs have been damaged, *inter alia,* as follows, which damage is continuing up to and including the date of the filing of this Complaint:

(a) The loss of revenues and future revenues from participation in major league professional football activities;

(b) The loss of profits and future profits from their participation in major league professional football activities, including admission revenues, concession profits, television royalties and contracts and numerous other forms of revenue and profits received by NFL member teams;

(c) The loss of goodwill and business reputation;

(d) The loss of numerous costs and expenses incurred by palintiffs in preparing for and submitting their application for membership to the NFL; and

(e) The loss of capital investment.

67. As a direct and proximate result of defendants' unlawful conduct, plaintiffs have sustained and will sustain in the future damages presently estimated to exceed $48 million dollars ($48,000,000.00) prior to trebling and prior to the inclusion of costs of litigation and reasonable attorney's fee.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

(a) That judgment be entered in favor of plaintiffs and against the defendants, jointly and severally, for threefold the damages plaintiffs have sustained as a result of the defendants wrongful acts;

(b) That defendants be ordered to pay to plaintiffs the costs of this litigation, including any expert witness fees and reasonable attorney's fees, and that judgment be entered in such amounts in favor of

plaintiffs and against defendants, jointly and severally; and

(c) Such other and further relief as may appear necessary and appropriate.

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Attorneys for Plaintiffs
Bosacco, Mid-South Grizzlies and Consolidated Industries, Inc.

OF COUNSEL:

LOUIS B. SCHWARTZ, *Esquire*
3400 Chestnut Street
Philadelphia, PA 19114

Dated: December 3, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,	:	Civil Action No. 79-4373
Plaintiffs,	:	
v.	:	
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,	:	
Defendants.	:	Jury Trial Demanded

ANSWER OF DEFENDANTS

Defendants, by their undersigned attorneys, answer the complaint herein and allege and aver, as follows:

First Defense

1. Defendants admit that plaintiffs seek to invoke the various antitrust laws referred to in paragraph 1 of the complaint, but deny that any of the defendants have violated the provisions of any antitrust laws or that any plaintiff has suffered any damage as alleged.

2. Defendants admit that subject matter jurisdiction is asserted under 28 U.S.C. §1337.

3. Defendants deny the allegations of this paragraph except that they admit that each of the member clubs of the National Football League (hereinafter "NFL") occasionally has transacted business within the Eastern District of Pennsylvania.

4. Defendants deny the allegations of this paragraph.

5. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

6. Defendants admit that an organization identifying itself as "Mid-South Grizzlies" and representing itself as a Tennessee limited partnership was an applicant during 1975-76 for a franchise in the NFL; aver that the application stated that "Toronto Football", identified in the application as an Ontario limited partnership, was to be the general partner in the Tennessee limited partnership; aver that the application stated that John F. Bassett was to be the chief executive officer of the Tennessee limited partnership; state that defendants are without knowledge or information sufficient to form a belief as to whether said Tennessee limited partnership ever was brought into being or currently exists as a partnership; and deny the remaining allegations of this paragraph.

7. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

8. Defendants admit that the NFL is a non-profit unincorporated association with offices at 410 Park Avenue, New York, New York; admit that defendant NFL exists as an organization to facilitate the presentation of professional football games by its member clubs; admit that the member clubs of the NFL conduct home operations in several cities throughout the United States; admit that the club which owns the NFL franchise for Philadelphia, Pennsylvania, conducts its home operations in the Eastern District of Pennsylvania, and plays professional football games with other member clubs of the NFL within that District; admit, for purposes of this answer only, that the defendant NFL conducts business within the Eastern District of Pennsylvania; and deny the remaining allegations of this paragraph.

9. Defendants admit that Pete Rozelle ("Rozelle") is the Commissioner of the defendant NFL and that the

offices of the NFL are at 410 Park Avenue, New York, New York; and deny the remaining allegations of this paragraph.

10. Defendants admit that with exceptions the named defendants are NFL member clubs; aver that each NFL member club conducts joint-venture professional football operations with other NFL member clubs in accordance with an annual schedule fixed by the NFL and within metropolitan areas determined by the NFL member clubs collectively; and deny the remaining allegations of this paragraph.

11. Defendants deny the allegations of this paragraph, except that they admit that the NFL member club which owns the franchise for Philadelphia, Pennsylvania, is found in, has an agent in, resides and transacts business within, the Eastern District of Pennsylvania.

12. Defendants deny the allegations of this paragraph.

13. Defendants admit that the defendant member clubs purchase equipment and supplies across state lines; admit that defendant member clubs travel across state lines for the presentation of games; admit that the telecasts of NFL games are transmitted and broadcast across state lines; admit that tickets to NFL games are occasionally sold by member clubs across state lines; admit that the conduct of professional football operations by the member clubs involves interstate commerce and that meetings of the member clubs to resolve their common business affairs require travel in interstate commerce; admit that promotional activities are conducted across state lines; and deny the remaining allegations of this paragraph.

14. Defendants admit the allegation of this paragraph.

15. Defendants admit that the NFL is currently the only nationally operating professional football league presenting professional football contests within the

United States; aver that the current position of the NFL as the only nationwide professional football league operating within the United States is the product of a Congressional statute enacted in 1966 (Public Law 89-800 (1966), 15 U.S.C. §1291 (1977)) approving the consolidation of the clubs of the NFL and the former American Football League in an expanded single league and of a decision by the member clubs of the World Football League ("WFL") in 1975 to discontinue the operations of that league; aver that other professional football leagues have, from time to time, operated within the United States; and deny the remaining allegations of this paragraph.

16. Defendants admit that the NFL exists to facilitate the conduct of professional football operations by its member clubs; aver that the authority and duties of the NFL are only those assigned to it by the member clubs of the NFL; aver that the NFL performs various administrative and promotional functions, including the fixing of the annual schedule of games to be participated in by the NFL member clubs; aver that, pursuant to a Federal statute (15 U.S.C. §§1291-1294 (1977)), it acts as agent for the NFL member clubs in periodic negotiations of the sale of member club television rights; and deny the remaining allegations of this paragraph.

17. Defendants admit that the functions performed by the NFL are as set forth in its Constitution and By-Laws, as amended from time to time by the member clubs; admit that the member clubs occasionally appoint various committees and subcommittees to investigate, report, and make recommendations to the member clubs collectively on particular aspects of their joint business affairs; aver that all business decisions involving the member clubs' common business affairs are made by the member clubs under voting procedures established by the NFL's Constitution and By-Laws; aver that neither the NFL nor Rozelle has a vote on NFL business deci-

sions; and deny the remaining allegations of this paragraph.

18. Defendants admit that each NFL member club is regularly assessed for payments sufficient to cover the expenses incurred by defendant NFL; aver that the NFL member clubs have in the past made decisions to enlarge their common operations by extending their joint operations to new cities; aver that the purchasers of expansion franchises are charged fees for the assets contributed by the existing member clubs to the new member club; and deny the remaining allegations of this paragraph.

19. Defendants admit that the NFL member clubs have from time to time voted to extend their joint operations to new cities, and have established new NFL franchises to conduct NFL operations at new locations; admit that, at the time of the events referred to in the complaint, the NFL Constitution and By-Laws provided that expansion of the NFL clubs' joint operations to an additional city required an affirmative vote of three-fourths of the then existing member clubs of the NFL; and deny the remaining allegations of this paragraph.

20. Defendants admit that a professional football league known as the World Football League ("WFL") operated during 1974 and for a portion of the 1975 season; admit that the WFL announced that it was ceasing to operate in October 1975; admit that for the period of the WFL's operations the member clubs of the WFL competed with the member clubs of the NFL for professional football players; admit that the WFL operated with 12 professional football teams in 1974 and with 11 professional football teams for a portion of the 1975 season; aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that the WFL was organized in 1973; and deny the remaining allegations of this paragraph.

21-23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of these paragraphs.

24. Defendants deny the allegations of this paragraph.

25. Defendants admit that no NFL franchise is currently located within the City of Memphis, Tennessee; aver that they are without knowledge or information sufficient to form a belief as to the current population of the States of Tennessee, Mississippi, and Arkansas; and deny the remaining allegations of this paragraph.

26. Defendants admit that professional foodball as conducted by the NFL member clubs is currently the only class of professional football carried on network television or radio and attracting national interest; and deny the remaining allegations of this paragraph.

27. Defendants admit that the NFL is the only professional football league currently operating on a national basis within the United States; and deny the remaining allegations of this paragraph.

28. Defendants admit that the complaint seeks to allege violations of Section 1 of the Sherman Act; deny that defendants, or any of them, have violated the provisions of that Section; and incorporate herein by reference their answers to paragraphs 1 through 27 of the complaint.

29. Defendants deny each of the allegations of this paragraph and of the subparagraphs of this paragraph.

30. Defendants deny the allegations of this paragraph, except that defendants aver that an organization representing itself as a Tennessee limited partnership and identifying itself as the "Memphis Grizzlies" applied in 1975 to become a member club of the NFL.

31. Defendants deny the allegations of this paragraph.

32. Defendants deny each of the allegations of this paragraph and of the subparagraphs of this paragraph, except that defendants admit that in 1975 two former NFL All-Pro players had performed football services for a former WFL franchise (known as the "Memphis Southmen") operating in Memphis, Tennessee; admit

that the head coach of the Memphis Southmen franchise of the WFL later became a head coach of one of the teams of the NFL and is presently director of player personnel of another NFL team; and admit that John Bassett was the former president of the Memphis Southmen franchise.

33. Defendants deny the allegations of this paragraph.

34. Defendants deny the allegations of this paragraph, except that defendants admit that persons connected with the former Memphis Southmen franchise of the WFL communicated to NFL representatives their intention to apply for an NFL franchise and that this expression of intention was communicated to NFL representatives both before and after the President of the WFL publicly announced on October 22, 1975, that the WFL was terminating its operations.

35. Defendants deny the allegations of this paragraph, except that they admit that by letter of November 3, 1975, attorneys for an organization identifying itself as the "Mid-South Grizzlies" notified the NFL Commissioner that they would in the near future submit an application for an NFL franchise to operate in Memphis, Tennessee for the 1976 season.

36. Defendants admit that attorneys for an organization representing itself as a Tennessee limited partnership and identifying itself as the "Mid-South Grizzlies" submitted an application for an NFL franchise by a written application dated November 17, 1975; and deny the remaining allegations of this paragraph.

37. Defendants deny the allegations of this paragraph except that they admit that there was enclosed with the application referred to in this paragraph a certified check payable to the NFL in the amount of $25,000; and aver that this check was promptly returned to the applying organization.

38. Defendants deny the allegations of this paragraph.

39. Defendants admit that representatives of the organization seeking to acquire an NFL franchise conferred with the NFL Expansion Committee on or about December 17, 1975; aver that these representatives were informed by members of the NFL Expansion Committee of the many reasons why the NFL Expansion Committee was unwilling to recommend to the full NFL membership that the NFL add a third expansion franchise to operate during the 1976 season; and deny the remaining allegations of this paragraph.

40. Defendants deny the allegations of this paragraph, except that defendants admit that all of the members of the NFL Expansion Committee, after evaluating the Memphis Grizzlies' proposal, were of the view that the interests of the NFL and its member clubs would not be served by adding three new franchises for the 1976 season or by accepting the Memphis Grizzlies' application for an NFL franchise.

41. Defendants deny the allegations of this paragraph.

42. Defendants admit that at a meeting of the NFL member clubs on January 9, 1976, representatives of an organization identifying itself as the "Memphis Grizzlies" were provided the opportunity to make a presentation to the defendant NFL clubs relating to the application of that organization for an NFL franchise; and deny the remaining allegations of this paragraph.

43. Defendants admit that representatives of an organization identifying itself as the "Memphis Grizzlies" were provided an opportunity to make a further presentation to the NFL member clubs relating to the application of that organization for an NFL franchise and that such presentation was made in San Diego, California, on or about March 17, 1976; and deny the remaining allegations of this paragraph.

44. Defendants admit that on or about March 17, 1976 representatives of an organization identifying itself as the "Memphis Grizzlies" met with the NFL's Execu-

tive Committee; admit that representatives of that organization made a full presentation relative to the application of that organization for an NFL franchise; admit that on or about that date representatives of the organization identifying itself as the Memphis Grizzlies conferred with other representatives of various defendants; and deny the remaining allegations of this paragraph.

45. Defendants admit that on or about March 17, 1976, defendants rejected the application for an NFL franchise by the organization identifying itself as the "Memphis Grizzlies"; admit that on or about that date defendant Rozelle publicly announced that decision by the NFL member clubs; and deny the remaining allegations of this paragraph.

46. Defendants deny the allegations of this paragraph.

47. Defendants admit that representatives of the former Memphis Southmen franchise of the WFL had indicated their intention to submit an application for an NFL franchise to the NFL before October 22, 1975, and that this informal statement of intention was communicated to the NFL while the WFL was still operating as a football league competing with the NFL; aver that representatives of other clubs in the WFL had expressed similar intentions from time to time; aver that the plans of former participants in the WFL to acquire NFL franchises, as communicated to various representatives of the defendants or as publicly announced, were constantly shifting and changing throughout the period from October 1975 through March, 1976; and deny the remaining allegations of this paragraph.

48. Defendants deny the allegations of this paragraph.

49. Defendants admit that in early 1974 the member clubs of the NFL voted to enlarge the League's operations by creating two new NFL franchises to operate in Tampa, Florida, and Seattle, Washington; admit that

these franchises were at that time scheduled to begin active NFL operations beginning in 1976; and deny the remaining allegations of this paragraph.

50. Defendants deny the allegations of this paragraph.

51. Defendants admit that Memphis, Tennessee, was one of a large number of cities evaluated by the NFL clubs in 1973 and 1974 for a two-team expansion in 1976; state that Seattle, Washington, and Tampa, Florida, were at that time determined by the NFL clubs to be more desirable sites for NFL expansion; and deny the remaining allegations of this paragraph.

52. Defendants admit that the individuals selected by the NFL clubs to become owners of the two NFL expansion franchises to operate in Seattle and Tampa had had no ownership involvement with any WFL club; aver that at the time such ownership decisions were arrived at it would have been legally improper for the NFL clubs to have offered ownership positions in NFL clubs to individuals then holding ownership positions in clubs of the WFL; and deny the remaining allegations of this paragraph.

53. Defendants admit that plaintiffs Bosacco and Tatham were publicly identified as having direct or indirect ownership positions with WFL clubs; deny that any of the other named plaintiffs are former owners of WFL teams; admit that clubs of the former WFL competed with NFL clubs for players during the period of the WFL's operations and that, subsequently, certain players who had played for WFL clubs played within the NFL; and state that they are currently without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

54-56. Defendants deny the allegations of these paragraphs.

57. Defendants admit that the complaint purports to allege a violation of Section 2 of the Sherman Act; deny that any of the defendants have violated the provisions of

that Section; and incorporate herein by reference their answers to paragraphs 1 through 56 of the complaint.

58-61. Defendants deny the allegations of these paragraphs and incorporate herein by reference their answers to paragraphs 1 through 61 of the complaint.

62-63. Defendants deny the allegations of these paragraphs and each of the subparagraphs contained therein.

64-65. Defendants deny the allegations of these paragraphs.

66. Defendants deny the allegations of this paragraph and each of the subparagraphs contained therein.

67. Defendants deny the allegations of this paragraph.

68. Defendants deny each and every allegation of the complaint not specifically answered herein.

Second Defense

The complaint fails to state a claim against these defendants, or any of them, upon which relief can be granted. The NFL clubs are not business or economic competitors of one another but participants in a joint venture enterprise directed at the presentation of a form of entertainment. The entertainment product which they jointly produce is competitive with every other form of entertainment offered in United States.

Expansion of the NFL represents a further subdivision of the joint assets of the existing NFL member clubs, and an NFL member club decision for expansion requires the exercise of business judgment by the NFL member clubs. The failure of the member clubs to grant, on demand, a franchise to the applicant to operate in Memphis, Tennessee, on a schedule proposed by the applicant, had neither an anti-competitive purpose or effect. Such decision was wholly devoid of any anti-competitive consequences, and did not constitute a violation of the Sherman Act.

Third Defense

Collectively and individually, plaintiffs lack any standing to bring this action under the federal antitrust laws, and they lack standing to sue for alleged damages.

Fourth Defense

The decision of the NFL member clubs in 1976 not to add another expansion franchise to the NFL, or to create a new NFL franchise to conduct NFL member club operations in Memphis, Tennessee, was the result of the exercise of business judgment of the NFL member clubs, which judgment was based on valid business considerations. Such a business decision is not actionable under the federal antitrust laws.

Fifth Defense

The defendant NFL member clubs, collectively and individually, have no monopoly of any relevant product in any relevant geographic market within the meaning of Section 2 of the Sherman Act.

Sixth Defense

The NFL's position as the only nationally operating professional football league in the United States at present was the product of a federal statute (Public Law 89-800 (1966), 15 U.S.C. §§1291-1294 (1977)) specifically authorizing the establishment of such a football league.

Seventh Defense

Plaintiffs sought to join the defendant NFL not to compete with it. Plaintiffs charge the NFL with an unlawful "monopoly" in 1976 of professional football operations, but plaintiffs are barred from recovering damages under the antitrust laws, even if plaintiffs' charges were correct, based on the denial of an alleged right to partici-

pate in such alleged unlawful "monopoly." On plaintiffs' allegations, the NFL's creation of an expansion NFL franchise to operate a football team in Memphis, Tennessee would have represented but an extension of the NFL's "monopoly," would have established plaintiffs as a participating member of such "monopoly," and would have resulted in plaintiffs' acquisition of a "monopoly" of professional football operations in the Memphis, Tennessee area. Such activities do not give plaintiffs a cause of action under the federal antitrust laws.

Eighth Defense

The Court lacks jurisdiction over the person of defendant Rozelle.

Ninth Defense

Because of the insufficiency of service of process, the Court lacks jurisdiction over the person of defendants.

Tenth Defense

Plaintiffs' claims are barred by laches and by the statute of limitations.

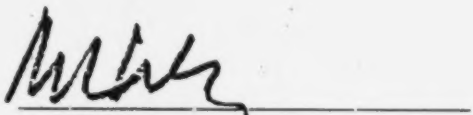
Eleventh Defense

Plaintiffs' claims are barred by waiver and estoppel.

Denial of Plaintiffs' Prayer for Relief

Defendants, and each of them, deny that any defendant has engaged in any violation of law and that plaintiffs, or any of them, are entitled to judgment, or to the costs of this litigation, or to attorneys' fees or to any form of relief.

WHEREFORE, the defendants pray that the complaint be dismissed with prejudice and with costs awarded to defendants.



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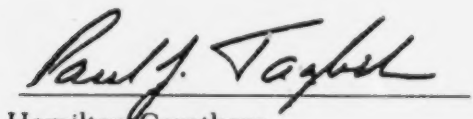

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Attorneys for Defendants

Dated: February 13, 1980

EXHIBIT "B"

20 August 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: *Mid-South Grizzlies Ltd., et al. v. NFL, et al.*
(E.D. Pa. Civ. No. 79-4373)

Dear Judge McGlynn:

On 12 August 1981, at oral argument on defendants' motion for summary judgment, Mr. Rubenstone advanced the argument that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry to the professional football marketplace. As an example, Mr. Rubenstone posited a fully qualified applicant for an NFL franchise, who insisted on locating his/her team in Guam and forcing the existing professional football enterprises to travel to Guam to play games with his/her team. Your Honor asked what the result in a subsequent antitrust lawsuit by such an applicant, denied a franchise, would be if in fact the NFL had neither had nor applied any objective, rational and fair standards governing their exclusion of such a prospective market entrant from the marketplace. Mr. Rubenstone indicated that he did not then know the answer and would like to think about it.

The answer to your Honor's question is found in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246 (1963). Silver had been a stockbroker, but had not been a member of the Exchange. Under the Exchange' rules, members were permitted to establish private wire communications with non-members. With the Ex-

change' permission, Silver had such wire connections with a New York member. This permission was withdrawn without notice or hearing, and Silver was excluded from the marketplace. On his subsequent antitrust lawsuit alleging a collective boycott, the Exchange argued that congressional policy evinced by the Securities Exchange Act justified the Exchange' collective self regulation both of its operations and of the marketplace.

In his opinion for the Court, Mr. Justice Goldberg framed the issued as whether the Congress, through the Securities Exchange Act, had "created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws". The Court held that such self-regulation was "justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act". Thus, the exclusion of Silver from the marketplace, which ordinarily would have constituted an illegal boycott, might be exempt from the antitrust laws as a result of the congressionally created duty of self-regulation imposed on the Exchange, *but only if fair procedures had been followed*, including notice and hearing.

Mr. Justice Goldberg continued:

> The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation. *Since it is perfectly clear that the Exchange can offer no justification* under the Securities Exchange Act *for its collective action* in denying petitioners

> the private wire connections *without notice and an opportunity for hearing*, and that the Exchange has therefore violated §1 of the Sherman Act, 15 U.S.C. §1, and is thus liable to petitioners under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26, *there is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action*. Thus there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises. Experience teaches, however, that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.

(emphasis supplied).

Thus, the answer to Your Honor's question is clear. Even where the duty of industry self-regulation is manifest in affirmative congressional enactments, there is no necessity for nor justification of exclusion of prospective market entrants from the marketplace without the application of fair, objective, rational standards governing the exclusionary decision and without notice and meaningful opportunity to be heard on the question. By their very actions without such standards, notice and opportunity, antitrust defendants violate the antitrust laws and there is no occasion to inquire of the sufficiency of the reasons

which they may later attempt to assign in justification of their actions.

Sincerely,

STEVE ALEXANDER
Counsel for Plaintiffs

SA/bab
Ref. No. 81-133SA
cc: The Clerk of the Eastern District of Pennsylvania
(for filing)
James C. McKay, *Esquire*
Morris Weisberg, *Esquire*

September 10, 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: Mid-South Grizzlies Ltd., et al. v. NFL, et al.
(E.D. Pa. Civ. No. 79-4373)

Dear Judge McGlynn:

This will respond to yesterday's request from your chambers. Since the Court's order of 13 August 1981, the following developments of record have occurred.

1. Plaintiffs responded by letter dated 20 August 1981 to a question put by the Court to Mr. Rubenstone during oral argument, the answer to which Mr. Rubenstone did not have at the time.

2. By letter dated 20 August 1981, plaintiffs renewed their demands for answers to interrogatories and production of documents, which demands both were pressed upon the Court in plaintiffs' motion to compel dated 12 December 1980, and are, in plaintiffs' view, encompassed by the Court's order of 13 August. The letter of 20 Aguust enumerated the specific interrogatories and requests for production, a response to which plaintiffs believe is proper and necessary to completion of the discovery allowed plaintiffs by the Court's order.

3. On 21 August 1981, plaintiffs filed a motion (with proposed order and supporting memorandum) for accelerated discovery. This motion requested that the Court order that defendants provide the discovery requested in plaintiffs' letter of 20 August within 15 days of the date of service of the letter. Attached to the motion as Exhibit "A" was a copy of the letter demand.

4. Under cover of a letter to the Court dated 26 August 1981, local counsel for defendants filed a formal opposition to plaintiffs' motion for accelerated discovery. Attached as an exhibit to the formal opposition was a letter to plaintiffs' counsel explaining the unavailability of Washington, D.C. co-counsel. In the cover letter to the Court, defendants' local counsel intimated that plaintiffs' renewal of their earlier interrogatories and requests for production would be resisted as not within the reach of the Court's order of 13 August, but promised nevertheless that the parties could stipulate to all appropriate discovery and the Court need not be troubled.

5. On 4 September 1981, defendants filed a supplemental opposition to plaintiffs' motion for accelerated discovery, stating that *defendants* had determined that only two of plaintiffs' renewed discovery requests are encompassed by the Court's order of 13 August, and those only to a limited extent. Lumping all other renewed requests together, without particularization or specification, defendants insisted that either they had already provided the information covered by the Court's order or

the requests exceed the scope of the order. Defendants promised delivery of that minimal information which they are willing to provide "as expeditiously as possible".

6. On 2 September 1981, plaintiffs filed, and served upon defendants, plaintiffs' (new) fourth request for production of documents. Each request enumerated therein falls specifically within the scope of the Court's order of 13 August.

7. Also on 2 September 1981, plaintiffs filed a second motion for accelerated discovery (with proposed order and supporting memorandum) requesting that defendants be ordered to respond to the fourth request for production within 15 days of its service upon them. To date, defendants have responded neither to the requests nor to the motion.

For the Court's convenience, a copy of each of the above enumerated documents is enclosed herewith. As requested, two proposed orders which will grant the discovery to which plaintiffs believe they are entitled, within a time frame to be set by the Court, are also enclosed. These are the proposed orders which accompanied the two motions for accelerated discovery; they will be found attached at the back of each motion enclosed herewith.

Plaintiffs wish to take this opportunity to assert with renewed vigor their position that they are absolutely entitled to and must be afforded the discovery requested above. The relevance of the items requested in plaintiffs' letter-demand is argued in plaintiffs' motion to compel discovery dated 12 December 1980, still pending before the Court. Defendants' generalized response that these discovery demands are either already satisfied or beyond the scope of the Court's order of 13 August is insufficient and entirely unacceptable. Defendants must be required to state with particularity whether they have any information or documents responsive to each such request, whether, for each such request, all such information has been provided or all or part is being withheld, and upon

what rational basis responsive information is being withheld. Only then will the Court be in an informed position from which to make a ruling as to each of plaintiffs' separately enumerated discovery demands. Plaintiffs respectfully request oral argument before the Court denies the relevance of any of these renewed requests.

As to plaintiffs' fourth request for production of documents, each demand for documents enumerated therein was specifically devised by plaintiffs to seek information bearing directly on the issues explored and debated in oral argument on defendants' motion for summary judgment. Particular emphasis was placed on the questions of competition among the defendants *inter se* and the competitive effect which plaintiffs' continued presence in Memphis could have had. Judging from defendants' prior response to related discovery demands, plaintiffs anticipate blanket resistence to their fourth request for production. In that event, plaintiffs respectfully request that the Court require defendants to enumerate, for each document request and with particularity, whether they possess responsive documents, whether any or all such documents have been provided or are being withheld, and the rational basis upon which any responsive document is being withheld. Plaintiffs will then be in a position to argue with particularity the relevance and necessity of any withheld documents. Plaintiffs respectfully request oral argument before the Court denies any request contained in plaintiffs' fourth request for production of documents.

I trust that this letter will clarify plaintiffs' position, and that the enclosed copies of the documents filed of record since the Court's order of 13 August will serve the Court's convenience. I should be pleased to provide any further assistance which the Court may desire.

Sincerely,

STEVE ALEXANDER

SA/bab
Ref. No. 81-149SA

Enclosures
cc: Morris L. Weisberg, *Esquire*
James C. McKay, *Esquire*

bcc: Professor Louis Schwartz
John E. Bosacco, *Esquire*
John Bassett
William Tatham

EXHIBIT "C"

September 16, 1981

Honorable Joseph L. McGlynn
8614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Mid-South Grizzlies v. N.F.L. Civil Action No. 79-4373

Dear Judge McGlynn:

Although plaintiffs, as expressed previously in our briefs and at oral argument, do not concede that summary judgment proceedings are appropriate at this point in this case and believe that they have a right to conduct full and complete discovery of defendants in preparation for trial of this case, Your Honor has, in connection with defendants' filing of a motion for summary judgment, issued an Order, dated August 13, 1981, which defines certain areas of discovery and sets a discovery cut-off date of October 31, 1981.

Upon review of the transcript of the oral argument held in the above matter on defendants' motion for summary judgment, the Court's questioning of counsel during that proceeding, review of the Court's Order, and after further reflection, it has occurred to plaintiff's counsel that Your Honor may have intended, by your Order, to focus the parties' attention, at this time, solely upon the issue of whether fair, objective, and articulated standards were applied by the defendants in passing upon plaintiffs' application for membership in the NFL, whether such standards existed at that time, and whether any substantive consideration, based upon such standards, was ever given to plaintiffs' application by the defendants. If so, the focus at this stage of the proceeding, would be upon this somewhat narrower issue as distinct from the broader and far more difficult

questions raised under the requisite Rule of Reason analysis, involving, for example, the prevailing conditions in the industry, the impact of defendants' conduct on competition, and the propriety of the business judgments employed by the defendants in their exclusion of a qualified competitor from the industry. Although plaintiffs believe that these business judgment and competition issues must ultimately be reached, it would appear that Your Honor has determined that an initial determination on the objective criteria issue is appropriate.

If Your Honor intended to so limit the scope of this proceeding, in doing so, to accept as true, for the purposes of this motion, the remaining allegations of plaintiffs' Complaint, and to delay consideration of the broader "Rule of Reason" issues to a subsequent point in the proceedings, much of the controversy which has resulted from plaintiffs' discovery requests filed subsequent to the Court's Order may be avoided.

The discovery requests now pending were designed to address, in great part, the broader issues in the suit which are essential to any final resolution of this case. This discovery was not confined to the more limited issues raised by the objective standards question. If, in fact, it was the Court's intention to focus only on the objective criteria question at this time, and to accept the remaining allegations in plaintiffs' Complaint as true for the purpose of this motion proceeding, the scope of discovery can be substantially limited without waiving our position, many of the pending discovery requests can be withdrawn, subject to renewal at a later point in the proceedings, and more specific discovery, written and oral, focused on the objective criteria question, can surely proceed without further intervention by the Court. Plaintiffs are confident that, if the issues are so defined, an accord as to the scope of this discovery can be easily reached with defendants' counsel.

If the Court is in agreement with the above, plaintiffs' counsel stand ready to promptly meet with defense counsel, either alone or with the Court, for the purpose of reaching agreement on the scope of discovery and establishing a deposition schedule. Furthermore, plaintiffs' counsel feel confident that all discovery on this more limited issue can be completed by or shortly after the October 31, 1981 date set by the Court in its Order.

Of course, should Your Honor feel that a conference would be appropriate to discuss the matters raised herein, I will make myself available at the Court's convenience.

Respectfully,

EDWARD H. RUBENSTONE

EHR/ejw
cc: James C. McKay, *Esq.*
Morris L. Weisberg, *Esq.*

EXHIBIT "D"

September 18, 1981

Edward H. Rubenstone, *Esquire*
SPRAGUE & RUBENSTONE
Suite 400
The Wellington Building
135 S. 19th Street
Philadelphia, Pa. 19103

Re: Mid-South Grizzlies v. NFL, et al.
Civil Action No. 79-4373

Dear Mr. Rubenstone:

Thank you for your letter of September 16, 1981. Your assumptions concerning the rationale underlying my order dated August 31, 1981 are correct.

On August 12, 1981, at oral argument on defendants' motion for summary judgment, you stated "that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry to the professional football market place." (See Mr. Alexander's letter of August 20, 1981 to the Court; Transcript of Oral Argument at 30-31, 41-42, 54-57). At the time of this oral argument, plaintiffs had outstanding requests for voluminous documents and answers to numerous interrogatories, which defendants refused to answer on the ground, *inter alia*, that compliance would be unduly burdensome.

In an effort to spare all parties the time and expense of what may prove to be unnecessary discovery proceedings, I entered my order of August 13th, which limited discovery at this stage of the litigation "solely to matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the

merger of the NFL and the American Football League". If discovery in this discrete area should reveal that the NFL applied objective standards to the plaintiffs' application, there may not be a need to conduct further discovery.

I assume it will not be necessary at this time for the Court to rule on the pending motions regarding plaintiffs' outstanding discovery requests since you stated in your letter that you will be able to reach an accord with defendants' counsel regarding these requests. I wish to emphasize, however, that I expect all discovery in the areas prescribed by my order of August 13th be completed by October 31, 1981, and that the briefing schedule set forth in that order be adhered to by all the parties.

Very truly yours,

JOSEPH L. MCGLYNN, JR.

JLMcGjr/mmf

cc: Morris L. Weisberg, *Esquire*
James C. McKay, *Esquire*

EXHIBIT "E"

September 23, 1981

BY HAND
Honorable Joseph L. McGlynn, Jr.
Room 8614 United States Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Mid-South Grizzlies, et al. v. The National Football League, et al., C.A. No. 79-4373

Dear Judge McGlynn:

Mr. McKay and I have received your September 18 letter to Mr. Rubenstone, confirming that discovery will currently be limited to the subjects identified in the Court's Order of August 13 and that such discovery will be completed by October 31, 1981. As we have previously made clear, defendants regard discovery on the terms specified by the Court to be appropriate, and we believe that broader discovery is unwarranted.

At the same time, we wish to reiterate the NFL's strong disagreement with plaintiffs' contention, as asserted most recently in Mr. Rubenstone's September 16 letter, that "broader and far more difficult questions" are raised under the antitrust Rule of Reason unless the NFL demonstrates that it applied "objective standards" in deciding not to enlarge its operations with an additional team in Memphis in 1976. As defendants' briefs demonstrate, they are entitled to summary judgment on *several* grounds that would obviate any need ever to reach a Rule of Reason issue here, including defendants' position that the NFL acted as a single business enterprise in deciding not to enlarge the League's operations to Memphis.[1]

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1. We also know of no authority for Mr. Rubenstone's assertion that on a motion for summary judgment all of the allegations of a complaint are to be accepted as true. As we have previously noted,

As a business organization, the NFL is entitled to make business decisions for reasons regarded as appropriate by its executive board. The antitrust laws do not compel boards of directors or executive committees to function with pre-established, published "objective criteria." Mr. Rubenstone's suggestion that the antitrust laws require "fair . . . articulated" standards is precisely the type of unfounded contention that this Court has rejected as an unsupportable " 'commercial due process' theory of violation of the antitrust laws." *Mogul v. General Motors Corporation*, 391 F. Supp. 1305 (E.D.Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976). The antitrust laws simply are not designed to serve as a federal tort law, purporting "to afford remedies" for all wrongs that a plaintiff believes to have occurred in interstate commerce. *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945). In short, while the NFL's decision clearly rested on sound business reasons, we cannot acquiesce in plaintiffs' suggestion that an antitrust defendant carries the burden of proof in that regard.

Finally, with respect to the antitrust principles pertinent to the NFL's motion for summary judgment, we wish to draw Your Honor's attention to the Third Circuit's recent decision in *Fleer Corporation v. Topps Chewing Gum, Inc.*, [1981-2 Trade Cas. ¶64,249, at page 74,040] (Aug. 25, 1981) (copy enclosed). The Court of Appeals there held that a unilateral decision of the executive board of an association (the major league baseball players organization) to decline to license or trade with a third party cannot violate Section 1 of the Sherman Act even if it deprives a party of a business opportunity. *Id.* at pages 74,051-52, paras. 50-52. Similarly, the unilateral decision of the NFL's Executive Committee not to un-

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NOTE — *(Continued)*

the settled law is to the contrary. F.R.Civ.P. 56(e); *Adickes v. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

dertake a hasty, ill-considered expansion of the League's operations presents no antitrust issue.

Very respectfully,

MORRIS L. WEISBERG

MLW:vm
Enclosure
cc: Edward H. Rubenstone, *Esquire*
[with enclosure]

EXHIBIT "F"

4 December 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: *Mid-South Grizzlies v. NFL* (E.D. Pa. Civ. No. 79-4373JLM)

Dear Judge McGlynn:

As Your Honor will recall, defendants filed a motion for summary judgment in this case. based on the tripartite argument:

> (1) that as a matter of law, defendants are not economic competitors inter se, but are a single economic entity (in the nature of a "partnership") incapable of conspiring under Section 1 of the Sherman Act, and their decision as a "partnership" not to admit a new "partner" lies outside the purview of Section 2;
>
> (2) that defendants had reasonable business justifications for determining in the first event not to "expand" their "partnership's" operations at all, irrespective of the applicant's substantive merits; and
>
> (3) that in any event, plaintiffs' application was substantially deficient because it failed to comply with several "rules" and "policies" of defendants, which failures would have justified defendants' rejection of it had they wished to expand at all.

After oral argument on 12 August 1981, the Court apparently denied defendants' motion, with leave to file a new motion upon the completion of specified, limited discovery. Memorandum Order, dated 13 August 1981.

The Court's intent was clarified in an exchange of correspondence between plaintiffs' counsel (letter from Mr. Rubenstone to the Court, dated 16 September 1981) and Your Honor's (letter from the Court to Mr. Rubenstone, dated 18 September 1981). Discovery was expressly limited to issues bearing directly on defendants' argument number (3) supra. The Court permitted plaintiffs to depose only the 4 members of the NFL's 1973 Expansion Committee and the NFL's Commissioner, Pete Rozelle.

The test for deciding any renewed motion by defendants for summary judgment was narrowed to

> whether fair, objective, and articulated standards were applied by the Defendants in passing upon Plaintiffs' application for membership in the NFL; whether such standards existed at that time; and whether any substantive consideration, based upon such standards, was ever given to Plaintiffs' application by the Defendants.

Letter from Mr. Rubenstone to the Court, dated 16 September 1981. The Court confirmed this narrowing of the issues by its reply, dated 18 September 1981, and by holding in abeyance plaintiffs' fourth request for production of documents and plaintiffs' renewal of numerous prior interrogatories, all of which sought discovery of facts relevant to defendants' arguments numbers (1) and (2) supra. By vigilantly attempting to confine the conduct of the depositions to areas of inquiry related to the test quoted above, counsel on both sides further confirmed this narrowing of the issues.

Your Honor will recall that at the oral argument had on 12 August 1981, on defendants' first motion for summary judgment, plaintiffs strenuously argued that summary judgment at that time, on that record, was premature. Plaintiffs had had no opportunity to cross-examine defendants' affiants by taking their depositions, and further, numerous interrogatories and requests for produc-

tion of documents, addressed to defendants and relevant to defendants' tripartite argument on summary judgment, were still pending before the Court on plaintiffs' motion to compel discovery. After oral argument, and focusing the parties' attention on the issue of objective standards, Your Honor continued to hold plaintiffs' motion to compel in abeyance, allowing instead only the limited discovery described above. Letter from the Court, supra, at 2.

Thus, by apparently denying defendants' original motion for summary judgment with leave to file and brief another, after this limited discovery, the Court appears to have limited the arguments upon which such a second motion could be based to defendants' argument number (3) supra (objective standards for rejection). In so doing, the Court appears at least implicitly and preliminarily to have ruled against defendants on their argument number (1) supra (single economic entity defense), and to have recognized that defendants' argument number (2) supra is necessarily a question for the trier of fact, involving, as it does, questions of motive, intent and reasonable judgment. *See* Letter from Mr. Rubenstone, supra, at 1-2; Letter from the Court, supra, at 1.

The purpose of this letter is to suggest that the parties can be spared the ordeal of the impending round of elaborate briefing, and that the Court can be spared the necessity of reviewing the briefs, holding oral argument and issuing a written opinion, on the narrow issue of the existence and application of objective standards governing defendants' rejection of plaintiffs' complaint. It is painfully obvious from the recent depositions that there indeed exist real disputes about the material facts upon which defendants' argument number (3) supra and the issue of objective standards are based. The testimony of Pete Rozelle and the members of the NFL's 1973 Expansion Committee conclusively establishes that the question of whether fair, objective and articulate stand-

ards, *even existed*, let alone whether such were applied to plaintiffs' application, cannot be determined in a summary judgment procedure. Indeed, the deponents themselves offered varying and inconsistent testimony about the very issues which we here claim to be indisputably triable.

Although counsel for defendants can reasonably be expected to advocate defendants' cause, it appears from the record now developed that reasonable men could not disagree that even the narrow issue of objective standards will have to be resolved by the trier of fact. We are now convinced that plaintiffs can and will successfully establish that in fact *no* objective standards were ever applied by defendants in connection with *any* "expansion" decision made by them. Even though we do not expect defendants' counsel to agree with us, we have no reason not to expect defendants' counsel to be forthright in conceding, at the minimum, that the recent discovery demonstrates beyond peradventure the existence of triable questions of fact on these issues.

In short, despite defendants' earlier position and in light of the subsequent discovery, we believe that even defendants should concede that the record patently precludes summary judgment by the Court on the subject of their impending motion, the existence of and application to plaintiffs of fair, objective decisional standards.

If we are correct in this belief, the most expeditious disposition of this issue will be achieved by defendants' counsel now candidly acknowledging to the Court the existence of disputed, material facts concerning their argument number (3) supra. If we are incorrect and defendants' counsel will not now so concede, we respectfully suggest that the Court could most expeditiously dispose of this issue by scheduling a briefing conference in chambers. At the conference, we and defendants' counsel could orally and openly examine and discuss with the Court the recent deposition testimony. Counsel for both sides can, of course, be expected to make honest

representations of fact concerning the deponents' testimony, differing only in counsel's respective interpretations of the import of the testimony.

The Court could then decide, on the basis of this exposure to the record, whether the Court actually needs defendants' proposed second motion for summary judgment and the extensive briefs now looming on the horizon. If the Court should agree with us that the testimony presents, at the minimum, triable questions of material fact, then the most expeditious disposition and the most judicious use of the Court's time would be to avoid a second defense motion for summary judgment at this time, and to proceed instead with the development of the case. Only if the Court should disagree with us, then in order to develop a full record in support of the Court's view and for appellate review, would it be necessary for the parties to brief and argue the defendants' proposed second motion, and for the Court to issue a written opinion.

For the Court's convenience, I include with this letter a copy of each of: (1) the Court's opinion and order, dated 13 August 1981; (2) the letter from Mr. Rubenstone to the Court, dated 16 September 1981; (3) the letter from the Court to Mr. Rubenstone, dated 18 September 1981; and (4) the letter from Mr. Weisberg to The Court, dated 23 September 1981.

Respectfully,

SPRAGUE & RUBENSTONE

By: _____
STEVE ALEXANDER

Counsel for Plaintiffs

SA/bab
Ref. No. 81-208SA

Enclosures

cc: HAMILTON CAROTHERS, *Esq.*
JAMES C. MCKAY, *Esq.*
PAUL J. TAGLIABUE, *Esq.*
EDWIN P. ROME, *Esq.*
MORRIS L. WEISBERG, *Esq.*
GARY GREEN, *Esq.*

bcc: Professor LOUIS B. SCHWARTZ
JOHN E. BOSACCO, *Esquire*
JOHN F. BASSETT
WILLIAM R. TATHAM

EXHIBIT "G"

December 10, 1981

BY HAND

Honorable Joseph L. McGlynn, Jr.
Room 8614 U.S. Courthouse
601 Market Street
Philadelphia, PA

RE: Mid-South Grizzlies, et al. v. National Football League, et al., Civil Action No. 79-4373

Dear Judge McGlynn:

Defense counsel has had a brief opportunity to review Mr. Alexander's unusual letter to the Court dated December 4, 1981. We do not think it appropriate to argue the content of that letter by further correspondence, although we obviously differ with the statements Mr. Alexander has submitted. Defendants shall, in accordance with the permission and the direction of the Court, file a renewed motion for summary judgment and a brief in support thereof by December 21, 1981.

Respectfully,

EDWIN P. ROME

EPR:vm
cc: All Counsel

EXHIBIT "H"

December 15, 1981

File No. 81-1308

Honorable Joseph L. McGlynn, Jr.
United States Courthouse
601 Market Street, Rm. 8614
Philadelphia, PA 19106

Re: Mid-South Grizzlies v. NFL
(E.D. Pa. Civ. No. 79-4373JLM)

Dear Judge McGlynn:

On December 4, 1981, Mr. Alexander, of Sprague & Rubenstone, our co-counsel in this case, alerted your Honor to Plaintiffs' belief that a substantial amount of the Court's and counsel's work may be avoided in connection with Defendants' renewal of their Motion for Summary Judgment.

In his letter, he requested a conference in the event that Defendants' counsel disagreed with Plaintiffs' position.

We since have received a copy of a letter dated December 10, 1981 sent to your Honor by Edwin P. Rome, Esquire, one of Defendants' lawyers. Unfortunately, Mr. Rome declined to address the points Plaintiffs raised in Mr. Alexander's letter, and instead stated that Defendants still intended to file their renewed Motion for Summary Judgment.

The question of whether Defendants have the right to file their renewed Motion is not the issue. They have that right even if it is for the purpose of merely protecting the record. The real issue is whether the case, as it has developed, should be stalled in the quagmire of Defendants' renewed Motion for Summary Judgment, with all discovery suspended, and the Court and Plaintiffs having to devote substantial resources to a renewed

Motion which, on its face, appears to a certainty to be unfounded.

Federal Rule of Civil Procedure One states that the Rules are to be construed to secure the just, speedy and inexpensive determination of every action. Defendants are proposing to elongate and protract the proceeding with a renewed Motion which appears to be totally unnecessary.

Accordingly, we urge the Court to schedule an immediate conference, at which time we may be able to convince the Court that other than to protect the record, Defendants' Motion is superfluous and that a comprehensive reply by Plaintiffs is not needed. At the same time, the Court might lift the existing ban on discovery and allow the case to progress to the next step.

Respectfully yours,

SPRAGUE & RUBENSTONE
and
SIDKOFF, PINCUS, GREENBERG & GREEN

By: _____
GARY GREEN

Counsel for Plaintiffs

GG:pau

Enclosures

cc: Hamilton Carothers, *Esq.*
James C. McKay, *Esq.*
Paul J. Tagliabue, *Esq.*
Edwin P. Rome, *Esq.*
Morris L. Weisberg, *Esq.*
Steve Alexander, *Esq.*

EXHIBIT "I"

December 17, 1981

Steven Alexander, *Esquire*
SPRAGUE & RUBENSTONE
Suite 400
The Wellington Building
135 S. 19th Street
Philadelphia, Pa. 19103

Gary Green, *Esquire*
SIDKOFF, PINCUS,
GREENBERG & GREEN
12th Floor
530 Walnut Street
Philadelphia, Pa. 19106

Re: Mid-South Grizzlies v. NFL, et al
Civil Action No. 79-4373

Gentlemen:

Thank you for the suggestions in your recent letters to the court. I appreciate your desire to conserve the resources of the lawyers, the litigants and the court.

It seems to me, however, that the best way to accomplish this objective is to adhere to my prior determination to dispose of the defendants' motion for summary judgment because if it is undisputed that the defendants used "objective, rational and fair decisional criteria" in rejecting plaintiff's application, then that may well be the end of the litigation ball game.

Very truly yours,

JOSEPH L. MCGLYNN, JR.

JLMcGjr/nz

cc: Edwin P. Rome, *Esquire*
Morris L. Weisberg, *Esquire*

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